INDEX

Supreme Court of the United States

October Term, 1975

No.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC., AND DORTHA GUY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner International Union of Electrical, Radio and Machine Workers ("IUE"), AFL-CIO, Local 790 prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on October 24, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 525 F.2d 124, is attached to this petition as Appendix A (1a-12a). The Order of the Court of Appeals denying rehearing, en-

tered on December 9, 1975, is attached to the petition as Appendix B (13a). The opinions of the District Court, reported at 8 FEP Cases 309, 311 and 313, are attached to this petition as Appendix C (14a-29a).

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1975. A timely petition for rehearing was denied on December 9, 1975, and this petition for certiorari is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a union member may be denied access to the administrative and judicial remedies for employment discrimination provided by Title VII of the Civil Rights Act of 1964 for failure to file a charge with the Equal Employment Opportunity Commission within the time limit set by 42 U.S.C. 2000e-5, if such a charge was filed within the requisite time period as calculated from the final denial of a grievance properly pursued under a collective bargaining agreement in force?

2. Whether the 1972 Amendments to Title VII, extending from 90 to 180 days the time for filing a charge with the EEOC, rendered timely any charge before the EEOC on the effective date of the Amendments and alleging discriminatory acts less than 180 days before that date?

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are attached hereto as Appendix D (30a-31a):

(1) Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964).

(2) Section 706(e) of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 104 (March 24, 1972) (42 U.S.C. § 2000e-5(e)).

(3) Section 14 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 113 (March 24, 1972).

STATEMENT OF THE CASE

Dortha Guy is a black female who was employed by respondent Robbins & Myers, Inc. ("the Company") in January 1968. Soon after her employment she joined the petitioner, Local 790 of the International Union of Electrical, Radio, and Machine Workers ("the Union"), the exclusive bargaining representative of employees in her unit. At the time of the events which precipitated this lawsuit, Ms. Guy was a union steward. In her capacity as steward, she filed many grievances under the collective bargaining agreement on behalf of her fellow employees.[1] And, during her employment with the Company, she filed on her own behalf at least six grievances, some of which were adjusted in her favor.

On October 25, 1971, the Company discharged Ms. Guy.

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[1] The collective bargaining agreement in force provided a three-step grievance procedure for "[a]ll differences, disputes and grievances that may arise after the signing of this Agreement between the Union, any employee or group of employees, and the company concerning the application or interpretation of this agreement." [Article XVIII—Grievance Procedure]. A fourth step, arbitration, was provided for certain kinds of disputes.

A grievance protesting the "unfair action" of the Company in discharging Ms. Guy was filed on October 27, 1971. Thereafter, the Union processed the grievance through the first three steps of the grievance procedure. The Company denied the grievance at the third step on November 18, 1971, and it was not pursued further.

On February 10, 1972—108 days after her discharge, but less than 90 days after the completion of the grievance procedure—Ms. Guy filed charges of racial discrimination relating to her discharge with the Equal Employment Opportunity Commission ("EEOC") against both the Company and the Union. The EEOC determined that "the timeliness and all other jurisdictional requirements have been met" (Determination, Case No. YME4-155), investigated the charge, and issued a "right to sue" letter on November 20, 1973. Ms. Guy then instituted this lawsuit under 42 U.S.C. § 2000e-5.

The Company moved to dismiss on the ground that Ms. Guy's EEOC charge had not been filed within 90 days of her discharge. The district court granted the motion. Noting that Ms. Guy's charge was filed 108 days after her discharge, and that at the time of the discharge the time limit for filing EEOC charges was 90 days, the court held that it was without jurisdiction to adjudicate her Title VII claim (24a). While recognizing that several courts of appeals had held that the time for filing an EEOC charge is tolled during the pendency of a formal grievance pursued in accord with a collective bargaining agreement, and that Ms. Guy's charge had been filed less than 90 days after completion of the grievance procedure, the district court viewed *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, as

precluding such tolling (22a-24a). The district court noted that Title VII was amended effective March 24, 1972 to extend the time for filing EEOC charges to 180 days from the date of the alleged discriminatory act, an extension which if applicable would have rendered Ms. Guy's charge timely without the need for tolling, but regarded that amendment as inapplicable to this case [2] (20a). See note 3, *infra*.

Following the district court's dismissal of the suit against the Company, the Union moved to be realigned as a party plaintiff for purposes of appeal, noting that the Union had negotiated the grievance procedure on behalf of its members and "is interested to see that its members' rights to their contractual grievance procedure is maintained and protected." This motion was granted, and the Union and Ms. Guy each appealed.

On October 24, 1975 the court of appeals affirmed the dismissal of the suit against the Company. On the tolling question, it reasoned that since Title VII "creates a right and liability which did not exist at common law and prescribes the remedy[,] [t]he remedy is an integral part of the right and its requirements must be strictly followed," citing *The Harrisburg*, 119 U.S. 199, 214 (4a-5a). Thus, the court held that it was powerless to toll the statutory period even if tolling would effectuate Title VII's underlying policies. The court also thought that *Alexander*, *supra*, and *Johnson* v. *REA, Inc.*, 421 U.S. 454, with their emphasis upon the independence of Title VII from other legal routes to relief

[2] Ms. Guy's discharge occurred 150 days prior to the effective date of the 1972 amendment. On the effective date, her charge was before the EEOC.

from employment discrimination, counseled against tolling Title VII time limitations to permit the effective pursuit of grievance procedures (4a).

The court of appeals also addressed the question of the effect of the 1972 amendments, a question raised in that court by the EEOC appearing as amicus curiae.[3] The court held the 1972 amendments extending the time to file EEOC charges to 180 days, effective March 24, 1972, cannot apply to this case, since "Guy's claim was barred on January 24, 1972" and "[t]he subsequent increase of time . . . could not revive plaintiff's claim." (8a-9a). Judge Edwards, dissenting on this point, noted that the Ninth Circuit, in *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975), had recently held that "the extended limitations period [applies] to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period." (522 F.2d, at 830; 10a). Judge Edwards would have remanded to the district court to consider the *Davis* rationale and its applicability to the present case (12a).

REASON FOR GRANTING THE WRIT

Introduction and Summary

The first holding below—that the pendency of a grievance does not toll the time limit for filing an EEOC charge—is

[3] The court of appeals believed it was not compelled to address this argument since it had not been raised below (8a). Nonetheless, it did reach the issue and decide it. Although the effect of the 1972 amendment was not expressly discussed by the parties in the district court, that court was aware of the amendment but decided it was inapplicable to this case. See p. 5, *supra*.

in direct conflict with the decisions of every other court of appeals which has considered the question—the Fifth Circuit, the Seventh Circuit, the Ninth Circuit, and the Tenth Circuit. Moreover, that holding is inconsistent with principles enunciated in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, for it would hamper the effectiveness of grievance-arbitration procedures and could discourage employees from pursuing such procedures to finality before filing charges with the EEOC. *Alexander* recognized the importance of grievance-arbitration procedures as a method of resolving employment disputes which might otherwise become the subject of Title VII complaints, and explained that Title VII must be construed so as not to compromise the functioning of such procedures or discourage resort to them. See also *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50.

The second holding of the court below, that the 1972 amendment enlarging the time for filing charges with the EEOC does not apply to charges concerning acts which occurred more than 90 but less than 180 days before March 24, 1972, is directly contrary to the decision of the Ninth Circuit in *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975).

Both issues are of great importance to the enforcement of Title VII. Indeed, the resolution of the tolling issue could have a vital impact upon the viability of the grievance-arbitration procedures as an effective forum for the resolution of employment discrimination claims. In view of the direct conflict among the Circuits on both issues, and the infidelity of the decision below to principles enunciated by this Court, certiorari should be granted.

I.

THE HOLDING OF THE COURT OF APPEALS THAT RESORT TO COLLECTIVELY BARGAINED GRIEVANCE PROCEDURES DOES NOT TOLL THE TIME PERIOD FOR FILING CHARGES WITH THE EEOC IS CONTRARY TO THAT OF EVERY COURT OF APPEALS WHICH HAS CONSIDERED THE ISSUE AND INCONSISTENT WITH PRINCIPLES ENUNCIATED RECENTLY BY THIS COURT.

1. Every other court of appeals which has considered whether resort to a collectively bargained grievance procedure tolls the time limit for filing a related employment discrimination charge with the EEOC has concluded that it does. *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Malone* v. *North American Rockwell*, 457 F.2d 779 (9th Cir. 1972); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1974), *Sanchez* v. *T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).[4] This result has been seen as effectuating Title VII's preference for private resolution of employment discrimination claims. As the Fifth Circuit explained in *Culpepper:*

> "This court has held many times that Title VII should receive a liberal construction while at all times bearing in mind that the central theme of Title VII is 'private settlement' as an effective end to employment discrimination. In Oatis v. Crown Zellerbach (5 Cir., 1968), 398 F.2d 496, this court held that:
>
> > 'It is thus clear that there is *great emphasis in Title VII on private settlement and the elimination of unfair practices without litigation.*'

[4] Indeed, the Sixth Circuit itself seems to have adhered to this rule in the past. *Schiff* v. *Mead Corp.*, 2 FEP Cases 1089 (6th Cir. 1970).

> This view was again voiced in Jenkins v. United Gas Corporation (5 Cir., 1969) 400 F.2d 28, where this court stated that:
>
> > '* * * EEOC whose function is to effectuate the *Act's policy of voluntary conference, persuasion and conciliation as the principal tools of enforcement.*'
>
> It would, therefore, be an improper reading of the purpose of Title VII if we were to construe the statute as did the district court to permit the short statute of limitations to penalize a common employee, who, at no time resting on his rights, attempts first in good faith to reach a private settlement without litigation in the elimination of what he believes to be an unfair, as well as an unlawful, practice." (421 F.2d, at 891.)

The court below believed that the force of this analysis has been undermined by this Court's decision in *Alexander, supra*, holding that arbitration decisions are neither binding nor necessarily entitled to deference in Title VII cases. But the Sixth Circuit is the only court of appeals to perceive any inconsistency between the *Alexander* decision and a ruling tolling the time for filing a Title VII charge while grievance-arbitration proceedings are pursued.[5]

2. Indeed, it is the decision below which is unfaithful to the principles enunciated in *Alexander*. This Court in *Alex-*

[5] Subsequent to *Alexander*, the Tenth Circuit squarely held that the time for filing EEOC charges is tolled by pursuit of a grievance. *Sanchez* v. *TWA*, 499 F.2d 1107 (10th Cir. (1974). See also *Burdzell* v. *Cities Service Co.*, 8 FEP Cases 467 (W.D. Pa. 1974), regarding *Alexander* as supporting tolling. Prior to *Alexander* three Circuits which had correctly anticipated the holding in *Alexander* simultaneously adhered to the view that pursuit of grievance procedures tolls the time for filing EEOC charges. Compare, *Culpepper, supra* (5th Cir. 1970); *Moore, supra* (7th Cir. 1972); and

ander recognized that Title VII's policy favoring voluntary compliance with employment discrimination laws was furthered by preserving arbitration as an effective remedy for employees' grievances. The Court noted that a rule requiring courts in Title VII lawsuits to defer to arbitration results:

> "might adversely affect the arbitration system as well as the enforcement scheme of Title VII. Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit. The possibility of voluntary compliance or settlement of Title VII claims would thus be reduced, and the result could well be more litigation, not less." (415 U.S., at 59).

Consequently, the Court declared "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue *fully* both his remedy under the grievance arbitration clause of a collective-bargaining agreement and his cause of action under Title VII," (Id., at 59-60), and held "that an individual does not forfeit his private cause of action if he *first* pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." (*Id.* at 49, emphasis added).

This holding was reaffirmed in *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, where the Court noted that arbitration is often an efficacious remedy

Malone, supra (9th Cir. 1972) with *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Oubichon* v. *North American Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973), noted in *Alexander, supra*, 414 U.S. at 45 n.5, as consistent with *Alexander*.

for employment discrimination, including charges of the "pattern and practice" variety (*id.*, at 66 & n. 18). Indeed, the IUE which, to vindicate the rights of its female and minority members, has vigorously pursued all of the alternatives open to parties claiming that there has been discrimination on the basis of race, color, sex, or national origin, has found that grievance-arbitration procedures often prove to be the most expeditious and effective way to remedy employment discrimination, although it has filed charges with the EEOC, the Labor Department and the NLRB and instituted lawsuits under Title VII, 42 U.S.C. § 1981, and the Equal Pay Act, 29 U.S.C. 206(d), when the employer has refused to correct discrimination through collective bargaining or the grievance-arbitration procedures. See *Westinghouse Electric Corp.* NLRB Case No. 6-CA-7680, JD-86-76 (Feb. 17, 1976), pp. 8-9, 11, 21-22, 24-27, describing the broad range of the IUE's equal opportunity enforcement program. Because of its belief in the grievance-arbitration mechanism as perhaps the best alternative for routing out employment discrimination efficiently and effectively, the IUE has begun exploring in collective bargaining the possibilities for novel grievance-arbitration procedures adapted precisely to employment discrimination complaints, and has drafted model contract provisions governing arbitration of employment discrimination claims. *Id.;* Hammerman & Rogoff (special assistants to the Director of Compliance of the EEOC), *The Union Role in Title VII Enforcement*, 7 Civil Rights Digest, A Quarterly of the U.S. Commission on Civil Rights, No. 3, pp. 22, 27-28; Newman, *Post-Gardner Developments in the Arbitration of Discrimination Claims*, Proceedings of the 28th Meeting,

National Academy of Annual Arbitrators, pp. 36, 57 (1975).

In *Emporium Capwell, supra*, the Court stated that "even if the arbitral decision denies the putative discriminatee's complaint his access to the processes of Title VII and thereby to the federal courts is not foreclosed. *Alexander* v. *Gardner-Denver Co., supra.*" 420 U.S., at 66 n. 18. However, while the grievance-arbitration procedure provides the fastest method for resolving discrimination claims, the period of time from the occurrence upon which a grievance is based to an arbitration hearing or to the arbitration award can well be more than 180 days.[6] Thus, unless the time period for filing an EEOC charge is tolled while grievance procedures go forward, the efficacy of the grievance-arbitration remedy for employment discrimination-related claims, and the possibility of improving those procedures with regard to such claims, will be severely compromised, and employees may well be "foreclosed" from Title VII processes and the courts after an adverse arbitration decision.

"The grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government [,] * * * the means of * * * molding a system of private law." *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581.[7] If an employee, in order to preserve

[6] Federal Mediation and Conciliation Service, *Twenty-Seventh Annual Report, Fiscal Year 1974*, at 48; Davis & Pati, *Elapsed Time Patterns in Labor Grievance Arbitration: 1942-1972*, 29 Arb. J. 15, 21 (1974).

[7] The courts which have recognized a rule tolling the time for filing a Title VII charge during the pendency of a grievance proceeding have uniformly, and in our view correctly, applied the rule only when a formal, pre-determined set of procedures acceded to

his Title VII action, were compelled to file a complaint with a government agency while the grievance-arbitration procedure was in process, the motivation for amicable, private settlement would then disappear, and the parties would instead look toward protecting their positions should litigation ensue. The likelihood of a conclusion to the grievance procedures satisfactory to all concerned would then greatly diminish.

Further, employees faced with the prospect that the deadline on their EEOC charge could run out while the grievance-arbitration procedure was in process, as the sources cited above, n. 6 *supra*, show is quite possible, could well choose to forego their contractual remedy for fear of losing their Title VII rights. The result in either case will be "more litigation, not less," *Alexander, supra*, and a burdening of the already over-taxed EEOC and federal courts with disputes which might be settled in the grievance-arbitration forum unions have negotiated for their members.

On the other hand, many union members will determine to pursue at first only the grievance procedure, with which they are familiar and which may have worked for them in the past. See p. 3, *supra*. These employees could, under the holding below, be precluded from any Title VII remedy should the grievance-arbitration procedure fail to produce satisfactory results, since such procedures can well, as noted above, run beyond the time limit for filing Title VII

in advance by the employer was invoked, and not when plaintiff claimed they had made ad-hoc attempts, outside of any agreed-upon procedure, to discuss or to settle the claim. *See, e.g., Moore* v. *Sunbeam Corp., supra*, 459 F.2d, at 827; *Dudley* v. *Textron, Inc.*, 386 F.Supp. 602 (E. D. Pa. 1975).

charges if pursued to their conclusion. Such a result would be in direct conflict with *Alexander*, which stresses that Congress intended to allow employees to pursue *both* contractual and Title VII remedies.[8]

3. The court below also misconstrued *Johnson* v. *REA, Inc.*, 421 U.S. 454, as casting doubt upon the grievance-tolling rule adopted by all other circuits. *Johnson* held that the time for filing a suit under the Civil Rights Act of 1866 (42 U.S.C. § 1981)—a time period determined by reference to analogous state statutes of limitation—is not tolled by the filing of a charge with the EEOC. The issue in this case, however, is not (as it was in *Johnson*) whether one statutory route for judicial relief regarding employment discrimination is to be adjusted by tolling to accommodate an entirely separate Congressional scheme for providing such relief. Rather, the question is whether the policies underlying Title VII *itself*, which, as *Alexander* recognized, prefer voluntary settlement without litigation, dictate tolling Title VII time limits to preserve the grievance-arbitration forum as an effective means to voluntary settlement.

The court of appeals believed that it was powerless to accommodate Title VII's underlying policies by tolling time limits contained in that statute. It relied upon the proposition that if a federal statute creating a new right contains time limitations upon the assertion of that right, a court may not create exceptions to that limitations period as

[8] The court below pointed to a passage in *Alexander* requiring "timely" filing of an EEOC charge as necessitating its decision (5a.). Obviously, the *Alexander* court did not purport to determine what constitutes "timely" filing, and under our approach a charge would have to be "timely" as calculated from the conclusion of grievance-arbitration proceedings.

it may do with an ordinary statute of limitations, citing *The Harrisburg*, 119 U.S. 199, and *Johnson, supra*. But this Court, in *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, noting the precise passage from *The Harrisburg* on which the court of appeals relied, held that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." (*Id.*, at 730.)[9] And, in *Johnson* the Court explicitly noted a distinction between the situation before it and one, as here, in which the limitations period was "derived directly from federal statutes rather than by reference to state law," 421 U.S., at 466, and suggested that in the latter situation a *more* flexible approach to the limitations period is warranted. *Id.*

Indeed, *Johnson* explicitly recognized that statutes of limitation can be tolled if to do otherwise "would be inconsistent with the federal policy *underlying the cause of action under consideration.*" Id., at 465 (emphasis supplied).[10] It held only that the policy presuppositions underlying 42 U.S.C. § 1981 did not dictate tolling for pursuit of

[9] *American Pipe* limited the holding of *The Harrisburg* to the situation in which both the right and the statute of limitations sought to be relied upon in federal court were state-created. (Id., at 729; see also *Burnett* v. *New York Central R. R. Co.*, 380 U.S. 424).

[10] Consistently with *American Pipe, supra*, and *Johnson*, the courts of appeal have generally held that exceptions to the literal time limits for filing EEOC charges may be allowed where appropriate to vindicate the fundamental policies of Title VII. *Reeb* v.

administrative remedies. Since, as *Alexander* demonstrates, discouraging or rendering ineffective the pursuit of grievance-arbitration procedures would frustrate the scheme of Title VII, to reject tolling in the present situation would be inconsistent with, rather than an effectuation of, the *Johnson* rationale.[11]

4. In sum, the holding of the court below, that pursuit of a grievance does not toll Title VII's time limit for filing EEOC charges, conflicts with the decisions of all other Circuits which have ruled on the question, is unfaithful to the policies of Title VII as elucidated by this Court in *Alexander*, and is premised upon a misunderstanding of the decision of this Court in *Johnson*. Since the result reached could undermine the effectiveness of grievance-arbitration procedures in many situations, and in others could preclude resort to the courts under Title VII, it is of great day-to-day importance in American industrial life, and this Court should grant certiorari to resolve the conflict.

Economic Opportunity Atlanta, Inc., 516 F.2d 927 (5th Cir. 1975); *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson* v. *Methodist Evangelical Hospital*, 464 F.2d 723 (6th Cir. 1972); *Richard* v. *McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972). See also *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975). *Cf. Love* v. *Pullman*, 404 U.S. 522.

[11] At least one district court has held that this Court's decision in *Johnson* is inapposite to the instant situation and has continued to apply a tolling rule for Title VII charges for the period of pendency of grievance proceedings. *Bush* v. *Wood Bros. Transfer, Inc.*, 11 FEP Cases 113 (S.D. Tex. 1975). *Contra, Roberts* v. *Lockheed*, 11 FEP Cases 1440 (C.D. Calif. 1975). The Fifth Circuit has continued to rely upon the *Culpepper* rule since this Court's *Johnson* decision. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 927 (5th Cir. 1975).

II.

The Decision Of The Court Of Appeals That The 1972 Amendment Extending The Time For Filing Title VII Charges Applies Only To Occurrences Less Than 90 Days Before The Effective Date Of The Amendment Is In Direct Conflict With That Of Another Court Of Appeals.

Even if tolling were not allowable, Ms. Guy's charge was timely if the 1972 amendment extending the filing period from 90 to 180 days applied to alleged acts of discrimination occurring within 180 days of its effective date, since Ms. Guy's discharge occurred 150 days before the effective date of the 1972 amendment.

On this issue, the decision below—that charges barred by the 90 days time limit could not be rejuvenated by the 1972 amendment—is in square conflict with that of the Ninth Circuit in *Davis* v. *Valley Distributing Co.*, 422 F.2d 827 (9th Cir. 1975). While the *Davis* court noted that generally "subsequent extensions of a statutory limitations period will not revive a claim previously barred," it abjured the wooden approach of the court below to this issue and maintained that "the question is one of legislative intent." *Id.*, at 830. As the *Davis* court noted, § 14 of the 1972 Act explicitly provided that amendments to § 706, of which the amendment extending the time for filing charges to 180 days was one, were to be applicable to all charges "pending" before the EEOC on the effective date of the Act, March 24, 1974, and all charges "filed" thereafter. After a careful review of the legislative scheme and its history, the *Davis* court could perceive "no substantial reason for giv-

ing less than their full meaning to the words of section 14" (*id.*, at 831) and concluded that "Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period." *Id.*, at 830.

There is no distinction between *Davis* and this case of any conceivable relevance. In both cases the charge was first filed with the EEOC more than 90 days after the occurrence complained of and before the effective date of the 1972 amendment. In both cases, the charge would have been timely within the literal language of § 14 if first "filed" after March 24, 1972,[12] and "t[o] require a second 'filing' by the aggrieved party * * * would serve no purpose other than the creation of an additional procedural technicality." *Love* v. *Pullman*, 404 U.S. 522, 527. Therefore, by analogy to *Love*, the EEOC was entitled to "properly hold [the] complaint in 'suspended animation', automatically filing it upon [the effective date of the 1972 Amendments]." *Id.*, at 526. Alternatively, since the EEOC had not dismissed the charge prior to March 24, it was "pending" on that date and is within the literal language of § 14 on that basis.

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[12] In *Davis*, the EEOC charge, first filed on March 14, was referred to a state agency because the complainant had failed to exhaust his state remedies and was consequently not *considered* formally filed until after March 24. Here, all procedural prerequisites to EEOC consideration were complied with before the charge was filed on February 10, and referral was unnecessary. Surely, Ms. Guy cannot be prejudiced by the fact that she had not failed, as Davis had, to meet Title VII's procedural prerequisites.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the court of appeals.

Respectfully submitted,

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APPENDIX A

Nos. 74-2144 and 74-2145

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DORTHA ALLEN GUY and INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790, *Plaintiff-Appellants,* v. ROBBINS & MYERS, INC. (HUNTER FAN DIVISION), *Defendant-Appellee.*	APPEAL from United States District Court for the Western District of Tennessee.

Decided and Filed October 24, 1975

Before WEICK, EDWARDS and PECK, Circuit Judges

WEICK, Circuit Judge, delivered the opinion of the Court, in which PECK, Circuit Judge, joined. EDWARDS, Circuit Judge, (pp. 9a-12a) filed a separate dissenting opinion.

WEICK, Circuit Judge. Appellant Guy has appealed from an order of the District Court dismissing her complaint for wrongful discharge brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. She claimed that her employer discharged her on account of her race (Negro).

The District Court granted the defendant's motion to dismiss her Title VII claim on the ground that plaintiff had

not met the jurisdictional prerequisites of § 2000e-5(d) of the Act which were in force at the time.[1] The Act required her to file a charge with the Equal Employment Opportunity Commission (EEOC) within 90 days from the date of her discharge. She did not file the charge until after the lapse of 108 days.

The District Court dismissed her claim for violation of § 1981 of 42 U.S.C. on the ground that it was barred by the one-year Tennessee statute of limitations. Tenn. Code 28-304.

It was Guy's contention that the 90-day requirement of the Act was tolled during the pendency of a grievance which she had filed with her employer under the provisions of a collective bargaining agreement entered into between her employer and the defendant labor Union.

The sole appellate issue is whether the filing of the grievance tolled the jurisdictional requirements of the Act.

Guy's claim under 42 U.S.C. § 1981 was controlled by our decision in *Johnson* v. *Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973), which was affirmed by the Supreme

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[1] "(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practices occurred. Except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

Court on May 19, 1975, 95 S.Ct. 1716 (1975). Guy has not appealed from this ruling and it has become final.

The Union originally was a party defendant but was dismissed by agreement with the plaintiff and has been realigned as a party plaintiff.

The facts pertaining to the Title VII issue were not in dispute. Guy was discharged on October 25, 1971 for failing to report for work following an authorized sick leave. A co-worker filed a grievance for her with the employer on October 27, 1971 which stated: "Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time." She did not explicitly claim racial discrimination. Guy processed her grievance to the third step under the collective bargaining agreement. The company rejected the grievance on November 18, 1971. Guy decided not to proceed further to arbitration. Instead she filed a charge with EEOC on February 10, 1972 which was 108 days from the date of her discharge.

The EEOC, although finding no evidence of racial discrimination, granted a right to sue letter which resulted in the filing of the present suit.

The District Judge was of the opinion that this case was controlled by the recent decision of the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

While the specific holding in *Gardner-Denver* was that the adverse decision of an arbitrator did not foreclose resort by the grievant to her federal remedy, the reasoning of the court, in our judgment, supports the proposition that the filing of a grievance under a collective bargaining agree-

ment does not toll the limitation period of an applicable federal or state statute.

The court pointed out that "in instituting an action under Title VII the employee was not seeking to review an arbitrator's decision but was asserting a right independent of the arbitration process."

The court referred to the legislative history which indicated Congressional intent that an employee could pursue any remedy which he may have under state or federal law. Thus, the employee could file proceedings under the National Labor Relations Act or with other federal, state or local agencies or pursue contractual remedies. In *Johnson* v. *Railway Express Agency, supra,* the court held that the various remedies are "separate, distinct and independent."

It would be utterly inconsistent with the thesis of *Gardner-Denver* and *Railway Express Agency* to hold that the pursuit of any of these remedies operates to toll other remedies which the employee has a right to resort to concurrently. See the statements of Senators Humphrey and Dirksen reported in 11 Cong. Rec. 12297 and quoted in *Banks* v. *Local Union, 136 Int'l Bhd. Elec. Eng'rs,* 296 F.Supp. 1188 (N.D. Ala. 1968).

In Tennessee, Civil Rights remedies are not provided by state or local law.

Subsection 5(d) of the Act contains an exception when the grievant has availed himself of remedies provided by state or local Civil Rights agencies and in such a case extends the time for filing a charge with EEOC from 90 days to 210 days after the unlawful employment practice or within 30 days after receipt of notice of termination of

state or local proceedings, whichever is earlier.

Guy would have us add another exception to the Act to toll the limitations' period of 90 days when the grievant resorts to a contractual remedy under a collective bargaining agreement.

We are not persuaded that we should add additional exceptions not authorized by Congress.

But most important is the language of Mr. Justice Powell who wrote the unanimous opinion of the court in *Gardner-Denver* at 47:

> . . . It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§ 2000e-5 (b), (e) and (f).

This is a clear pronouncement that the 90-day limitation period in the Act for filing a charge with EEOC is a jurisdictional prerequisite "that an individual must satisfy before he is entitled to institute a lawsuit." Here Guy admittedly did not meet the jurisdictional prerequisite.

The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends.

As early as 1886 the Supreme Court recognized the distinction between a statute of limitation and a limitation contained in a statute creating liability and imposing a remedy.

In *The Harrisburg*, 119 U.S. 199, 214, the court stated:

> . . . [W]e are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . .

In *Matheny* v. *Porter, Price Adm'r*, 158 F.2d 478, 479 (10th Cir. 1946), the court said:

> . . . Ordinarily, a statute of limitation does not confer any right of action, but merely restricts the time within which the right finding its source elsewhere may be asserted. It is not a matter of substantive right. It neither creates the right nor extinguishes it. It affects only the remedy for the enforcement of the right. And unless it affirmatively appears from the face of the complaint that the cause of action is barred by the applicable statute, limitation must be presented by special plea in defense. . . .
>
> But here, section 205(e) creates a new liability, one unknown to the common law and not finding its source elsewhere. It creates the right of action and fixes the time within which a suit for the enforcement of the right must be commenced. It is a statute of creation, and when the period fixed by its terms has run, the substantive right and the corresponding liability end. Not only is the remedy no longer available, but the right of action itself is extinguished. The commencement of

> the action within the time is an indispensable condition of the liability. Cf. The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358; Midstate Horticultural Co., Inc. vs. Pennsylvania R. Co., 320 U.S. 356, 64 S.Ct. 128 88 L.Ed. 96.

In *Callahan* v. *Chesapeake & O. Ry. Co.*, 40 F.Supp. 353, 354 (E.D. Ky. 1941), District Judge Mac Swinford stated:

> "The rule is stated in the syllabus from Morrison v. Baltimore & Ohio Railroad Company, 40 App. D.C. 391, Ann. Cas. 1941C, page 1026, as follows: "Under the Federal Employers' Liability Act of June 11, 1906 (Fed. St. Ann. 1909 Supp. p. 585) the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right."

Johnson v. *Railway Express Agency, supra,* held that the timely filing of a charge with EEOC under Title VII of the Act did not toll Tennessee's applicable one-year statute of limitations. It would therefore appear to us to be utterly incongruous for us to hold that a federal statute which contains jurisdictional prerequisites for the exercise of its remedies is tolled by the mere filing of a grievance under a collective bargaining agreement.

Under Guy's contention the exercise of rights under Title VII could be delayed indefinitely for many years while an individual is pursuing other remedies. This contention conflicts with Congressional intent made manifest by the short

periods of time provided in the Act as prerequisites for the exercise of the rights.

Guy relies on the following decisions from other Circuits: *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez* v. *T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).

It is noteworthy that all of these cases, except *Sanchez*, were decided prior to *Gardner-Denver* and hence are inapposite. *Sanchez* relies on these prior decisions. *Sanchez* conflicts with *Johnson* v. *Railway Express Agency, supra.*

In the brief of EEOC as amicus curiae a new issue is injected into the case which was not raised by plaintiff in the District Court, namely, that under the 1972 amendments to Title VII it had authority to assume jurisdiction retroactively to charges pending before the Commission. It relies on *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

Since this issue was not raised in the District Court by any party to the case, we are not required to consider it. *United States* v. *Summit Fid. & Sur. Co.*, 408 F.2d 46 (6th Cir. 1969); *Wiper* v. *Great Lakes Engineering Works*, 340 F.2d 727 (6th Cir.), *cert. denied*, 382 U.S. 812 (1965).

We do note, however, that in *Love, supra*, the charge had been timely filed with the Commission so that the jurisdictional prerequisite had been met.

Plaintiff Guy's claim was barred on January 24, 1972. She did not file her charge with EEOC until February 10, 1972. The amendments to Title VII, increasing the time within

which to file her charge to 180 days, did not become effective until March 24, 1972. 42 U.S.C. § 2000e-5(e). The subsequent increase of time to file the charge enacted by Congress, could not revive plaintiff's claim which had been previously barred and extinguished.

The judgment of the District Court is affirmed.

Edwards, Circuit Judge, Dissenting. Appellant Guy was discharged for failure to report back to work on her production job with appellee Robins and Myers at the end of sick leave which had been granted to her. She claims that she notified appellee that she was not able to return on the day set, but when she did return four days later, she was informed she had been discharged.

Promptly on October 27, 1971, the union filed a grievance on her behalf, alleging that the discharge was illegal under the union-management contract. This grievance was denied at the third step on November 18, 1971. Thereafter plaintiff filed a charge, alleging that her discharge was racially motivated, before the Equal Employment Opportunity Commission. This charge was filed February 10, 1972, 108 days after her discharge. At the time the EEOC limitation provided for a 90-day period within which to file the charge. On March 24, 1972, however, Title VII was amended to increase the filing time to 180 days. See 42 U.S.C. § 2000e-5(d). EEOC, in an amicus brief filed in this appeal, asserts that the 1972 amendment should be read retrospectively as applicable to appellant's complaint, since it was pending in EEOC's possession at the time when the amendment became effective 151 days after plaintiff's discharge.

The EEOC position is that the amendment did not create

a new cause of action. It merely increased the period from 90 to 180 days before the limitation became effective.

In *Davis* v. *Valley Distributing Co.*, ... F.2d ..... (9th Cir. 1975) (No. 73-2725, decided July 30, 1975), the court, per Browning, J., held that a similar 180-day extension amendment (applicable to filing before the EEOC) should be given retroactive effect. The court said.

> The 1972 Act became effective March 24, 1972. The prior 90-day limitation had run on appellant's complaint some 54 days earlier. It is the general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred. *James* v. *Continental Insurance Co.*, 424 F.2d 1064, 1065-66 (3d Cir. 1970). But the question is one of legislative intent; and though not free from doubt, we think it the more likely conclusion that Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period.

Section 14 of the 1972 Act provides:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges file thereafter.

Initially, both the House and Senate bills provided that the amendments to section 706 would *not* apply to charges filed prior to the effective date of the amendments. H.R. 1746, 92d Cong., 2d Sess. § 10 (1972); S. 2515, 92d Cong., 2d Sess. § 13 (1972). Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable

to pending claims. *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th Cir. 1975); *Koger* v. *Ball*, 497 F.2d 702, 708 (4th Cir.) 1974). But Congress did not limit section 14 of the 1972 Act to the new remedy, although it would have been simple to do so. The language of section 14 is sweeping. It includes all amendments to section 706. Congress was, of course, aware of the other amendments to section 706 contained in the same bill. The provision extending the limitation periods was called to Congress' attention by committee reports and in floor debate. In both the House and Senate, prior court decisions maximizing coverage within the given time limits were noted with approval, and the remedial purpose of extending the 90-day period to 180 days was emphasized.

The words of section 14 affirmatively suggest an intention to encompass discriminatory conduct that occurred before the Act was passed "[C]harges pending with the Commission on the date of enactment of this Act" could only involve conduct occurring prior to that date. It might be contended that a charge filed with EEOC after the pre-amendment 90-day limitation had expired, as in this case, was not "pending" on the effective date of the Act. It is unnecessary to argue the point. Section 14 also makes the amendments applicable to "all charges filed thereafter." Since appellant's claim was not formally "filed" until EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, it fell within the literal words of the statute.

There is no substantial reason for giving less than their full meaning to the words of section 14. Even as extended, the time limits under the statute are exceedingly short, particularly since, as Congress noted, most complaints are laymen representing themselves. The

Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of victims of discrimination. *EEOC* v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189 (9th Cir. 1974). Accordingly, "courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the complaining party." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970).

Davis v. *Valley Distributing Co., supra*, at ——. (Footnotes omitted.)

This issue, as outlined above, was not presented to the District Court in our instant case, and in fairness to the District Judge, it should be.

I would remand this case for consideration of the effect of the 1972 EEOC amendments.

APPENDIX B

Nos. 74-2144 and 74-2145

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed December 9, 1975

DORTHA ALLEN GUY
and
INTERNATIONAL UNION OF ELECTRICAL RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790,
Plaintiffs-Appellants,

vs.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Defendant-Appellee.

ORDER

Before WEICK, EDWARDS and PECK, Circuit Judges

This cause came on to be heard upon the petition for rehearing with the suggestion that it be reheard en banc. No active Judge having requested that the petition be reheard en banc, the petition for rehearing was considered by the panel and was found to be not well taken.

It is therefore Ordered that the petition for rehearing be and it is hereby denied. Judge Edwards dissents.

ENTERED BY ORDER OF THE COURT.
John P. Heliman, *Clerk*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Filed May 30, 1974

DORTHA ALLEN GUY,
Plaintiff,

vs.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION), *et al.*,
Defendants.

No. C-74-165

ORDER

This complaint against an employer and local union arises out of an alleged discriminatory termination from her job at Hunter Fan Division of Robbins & Myers, Inc., (herein referred to as R & M) on or about October 25, 1971. The suit is brought by a black female under 42 U.S.C. § 2000-e et seq. (as amended) and 42 U.S.C. § 1981; jurisdiction is asserted under the Equal Employment Act (42 U.S.C. § 2000(e)5(f)(3)) and 28 U.S.C. § 1343(4). She claims also that the Union failed to represent her because of her race. The complaint avers that on February 10, 1972, a charge was filed with the E.E.O.C. alleging a discriminatory discharge while plaintiff was purportedly on sick leave, and it further sets out a notice of right-to-sue by E.E.O.C. on or about November 20, 1973. This suit was filed on March 19, 1974.

Defendant R & M has filed a motion to dismiss on several

different grounds. First, we consider the motion with respect to 42 U.S.C. § 1981. Tennessee has a one year statute of limitations which has been held applicable to actions brought under 42 U.S.C. §1981 and other sections of the Civil Rights Act of 1866.[1] This suit was filed nearly two and a half years after the alleged wrongful discharge and over two years after a charge was submitted to the E.E.O.C. The claim under 42 U.S.C. § 1981 is barred on its face by the Tennessee statute of limitations of one year. *Johnson* v. *R.E.A.*, 489 F.2d 525, 529 (6th Cir. 1973) reh. denied, (1974); *Snyder* v. *Swann*, 313 F.Supp. 1267 (E.D. Tenn. 1970). Title VII civil rights actions and actions under 42 U.S.C. § 1981 are independent. *Alexander* v. *Gardner-Denver Co.* —— U.S. ——, 42 L.W. 4214 (1974); *Johnson* v. *R.E.A., supra*, p. 530. See *Long* v. *Ford Motor Co.*, —— F.2d ——, #73-1993 (6th Cir. 1974). Filing the charge with E.E.O.C. therefore did not toll the statute of limitations. *Johnson* v. *R.E.A., supra*, pp. 529-531; *Jenkins* v. *Gen. Motors*, 354 F.Supp. 1040 (D. Del. 1973); *Young* v. *I.T.T.*, 438 F.2d 757 (3rd Cir. 1971).

Plaintiff argues, however, that to apply the Tennessee one year statute above cited (see footnote [1]) is unconstitutionally discriminatory because plaintiff's claim is in its nature contractual and should instead be subject, if at all,

[1] "Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after the cause of action accrued."

to a six year limitation set out in the case of breach of contract in T.C.A. § 28-309. Plaintiff relies upon *Republic Pictures* v. *Kappler,* 151 F.2d 543 (8th Cir. 1945), affirmed per curiam, 327 U.S. 727 (1946). That case, however, was based upon a Fair Labor Standards Act claim, 29 U.S.C. § 201 et seq., which, like 42 U.S.C. § 1981, contained no "built in" limitations period of its own. Iowa had adopted a special six months statute of limitations limited to actions brought under federal statutes. The Court observed:

> "Here, the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitations for the bringing of such actions than that prescribed for the bringing of similar actions . . ." (p. 547)

Under these special circumstances, despite a strong dissent by Judge Sanborn, the state statute was held to be a 14th amendment denial of equal protection. The situation in the instant case is dissimilar. Tennessee's limitation is applicable generally to a number of tortious types of actions; has been on the books for many years; is a reasonable period of limitation (twice as long as the Iowa Statute); and is not directed against federal statute or civil rights plaintiffs discriminatorily. See *Swick* v. *Martin Co.,* 68 F.Supp. 863 (D. Md. 1946) affirmed 160 F.2d 483 (4th Cir. 1947) cert. denied 332 U.S. 772. Plaintiff is not being "cast out because [s]he is suing to enforce a federal act." *McKnett* v. *St. Louis & S. F. Railroad,* 292 U.S. 230 (1934) cited in *Koppler, supra,* p. 546, is accordingly inapposite here. Additionally, plaintiff's claim under the old civil rights act lies in tort, not in contract. *Johnson* v. *R.E.A. supra,* p. 529. Defendant R & M's motion to dismiss plaintiffs claim under 42 U.S.C. § 1981 and 28 U.S.C. § 1343(4) is therefore granted for the reasons stated.

The timetable in this case with respect to the 90 day period for filing suit in Title VII equal employment opportunity situations[2] is hereafter set out as stated by plaintiff:

1. On or about November 20, 1973, plaintiff received her right to sue letter;

2. Through February 18, 1974, plaintiff sought but did not find legal assistance;

3. February 19, 1974, plaintiff visited the United States District Court Clerk's office and presented her right to sue letter and asked for appointment of counsel;

4. The clerk of the court referred her to the Shelby County Legal Services office and told her that she could ask that office to represent her.

On February 19, 1974, if plaintiff received the E.E.O.C. notice or letter on or about November 21, 1973, approximately 90 days had already elapsed.

On February 20, 1974, plaintiff's attorney filed the right to sue letter and sought an extension of time in which to

[2] Equal Employment Opportunity Act of 1972, Sec. 706(f)(1) . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has notified a civil action in a . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge.

file a lawsuit. Judge Robert M. McRae of this Court granted an extension of 30 days.

On February 21 to March 18, 1974, plaintiff's attorney sought to conciliate.

It may be that plaintiff has failed to comply with this time requirement which is held to be a jurisdictional prerequisite. *Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970); *Johnson* v. *R.E.A., supra.* The filing of a right-to-sue letter does not, in and of itself, extend the limitations period. Cf. *Huston* v. *G.M.C.*, 477 F.2d 1003 (8th Cir. 1973); *Harris* v. *National Tea Co.*, 454 F.2d 307 (7th Cir. 1971). The action purportedly extending the time may not have been a jurisdictional act. *Kavanaugh* v. *Noble*, 332 U.S. 535 (1947); *Rosenman* v. *U.S.*, 323 U.S. 658 (1945). Equitable considerations come into play, however, *if* the Court, as alleged, attempted to grant the extension and *if* plaintiff and her counsel relied upon that action and did what is alleged in the complaint in seeking to preserve or protect her rights. Nothing has been submitted by defendant to controvert plaintiff's and her counsel's assertions in this respect. The motion to dismiss on this basis is overruled at this time based on the present state of the record on the authority of *Harris* v. *Walgreen's*, 456 F.2d 588 (6th Cir. 1972); *Harris* v. *National Tea*, 454 F.2d 307 (7th Cir. 1971); *Workman* v. *Ravenna Arsenal*, 6 FEP Cases 149 (N.D. Ohio, 1973).

It is not necessary that the Court consider plaintiff's further argument with respect to whether the 90 day E.E.O.C. limitation is tolled by reason of her filing a grievance discharge during this period. It is noted, however, that her grievance referred only to an "unfair action" of

defendant R & M and did not specify any racial animus or basis of this action. The rationale of *Alexander* v. *Gardner-Denver, supra,* might indicate that the union contractual grievance and the E.E.O.C. claims, being independent of each other, as in the case of the 42 U.S.C. §1981 claim, the processing or pursuing of such relief separately would not amount to a tolling of nor effect any extension of a limitation period. See *Johnson* v. *R.E.A.*, supra.

The Court dismisses plaintiff's 42 U.S.C. §1981 claim against R & M. The Title VII action is not dismissed and defendant's motion seeking such dismissal at this stage is overruled.

This 30th day of May, 1974.

/s/ HARRY W. WELLFORD
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Filed June 12, 1974

DORTHA ALLEN GUY,
Plaintiff,

vs.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION), *et al.*,
Defendants.

No. C-74-165

MEMORANDUM OPINION AND ORDER

Defendant has renewed its motion to dismiss plaintiff's suit because of her failure to comply with 42 U.S.C. § 2000e-5(d) requiring the filing of a charge with Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred.[1] The relevant times and acts that took place in this case all occurred prior to March 24, 1972. The amendment extending the time for filing 42 U.S.C. § 2000e-5(e) was prospective in its application. From the pleadings and memorandum filed on plaintiff's behalf, it is clear that she was to report back to work on October 24, 1971, when her sick leave expired. On October 29, 1971, when she returned to work, she found that she had been terminated on October 25, 1971, as having voluntarily quit, a status she contested by filing a union grievance on October 27, 1971. She filed a charge against her

[1] This provision in the 1964 Civil Rights Act dealing with employment discrimination was amended March 24, 1972, by the 1972 Civil Rights Act. (42 U.S.C. § 2000e-5(e).

employer with E.E.O.C. on February 10, 1972, asserting that the Company's action was unfair. (She did not describe it as discriminatory).

"It is true that the statute requires the person aggrieved to file a written charge within 90 days; it says so clearly and the courts so hold." *Fore* v. *Southern Bell Tel. Co.*, 293 F.Supp. 587, 588 (W.D. N.C. 1968). See also *McCarty* v. *Boeing Co.*, 321 F.Supp. 260 (W.D. Wash. 1970); *Younger* v. *Glamorgan Pipe Co.*, 310 F.Supp. 195 (W.D. Va. 1969); *Gordon* v. *Baker Prot. Services*, 358 F.Supp. 867 (N.D. Ill. 1973); and *Heard* v. *Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

"It may be conceded that a typical lay-off, without more, is not a continuing event, but is a completed act at the time it occurs, so that a charge alleging a discriminatory lay-off must ordinarily be filed within 90 days thereafter." *Sciaraffa* v. *Oxford Paper Co.*, 310 F.Supp. 891 (D. Me. 1970). From the complaint itself the alleged discriminatory discharge and refusal to reinstate took place in October, 1971, more than 90 days prior to the charge with the E.E.O.C. on February 10, 1972. Unless the act complained about were continuous in its nature, re-occurred after October, 1971, or unless the period were somehow tolled, plaintiff is barred because of her failure to comply with statutory jurisdictional requisites. *Choate* v. *Caterpillar Tractor*, 402 F.2d 357 (7th Cir. 1968); *Mickel* v. *S. C. State Emp. Service*, 377 F.2d 239 (4th Cir. 1967); *Sanchez* v. *Standard Brands*, 431 F.2d 455 (5th Cir. 1970).

Senator Everett Dirksen on June 5, 1964, in explanation of changes made by the Senate in the House bill, with particular reference to Section 706(d):

> 'New Subsection (d) requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in Subsection (b), he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. The additional 120 days is to allow him to pursue his remedy by State or local proceedings." 11 Cong. Rec. 12297. *Banks* v. *Local Union* #136, 296 F.Supp. 1190 (1968)

Tennessee does not have a civil rights law or did not during 1971 and 1972.

Plaintiff contends, on the authority of *Culpepper* v. *Reynolds Metals,* 421 F.2d 888 (5th Cir. 1970), that the 90 day period is tolled because she filed a grievance directed toward the defendant company within that period.[2] See *Hutchings* v. *U. S. Industries,* 428 F.2d 303, 309, (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.* 457 F.2d 779, 781 (9th Cir. 1972); *Moore* v. *Sunbeam Corp.,* 459 F.2d 811, 826 (7th Cir. 1972). These cases, however, are based on the rationale that plaintiff should be encouraged first to try the grievance procedures before resorting to the E.E.O.C. and that the acts are interrelated in respect to disputes over discrimination. *Dewey* v. *Reynolds Metals,* 429 F.2d 324 (6th Cir. 1970) affirmed by a divided Supreme Court, 402 U.S. 689 (1971). *Dewey* and its progeny held that pursuing a contractual grievance remedy to its conclusion might estop later pursuit by a claimant of E.E.O.C. procedures and suit; that the remedies were related and interconnected. *Culpepper, supra,* held, however, that utilization of grievance procedure did not estop, preclude, or constitute an election of remedies insofar as a grievant was concerned who might later claim violation of the 1964 Civil Rights Act equal employment provisions.

[2] She also complains that the defendant union failed to represent her fairly and diligently.

In 1974, however, the Supreme Court unanimously in ***Alexander*** **v.** ***Gardner-Denver Co.,*** ..... **U.S.** ....., **42 L.W. 4214 (2-19-74)** disavowed the *Dewey* v. *Reynolds Metals, supra,* rationale. At page 10 of the slip opinion, the Court acknowledges that "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; *and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit."* .(Emphasis ours.) The Court goes on to hold that grievance-arbitration procedures neither foreclose nor preclude an individual's E.E.O.C. rights and requirements, nor divest the court of jurisdiction to decide equal employment discretion questions that may arise under the Act. In other words, "Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under Title VII" and other statutes or private contract remedies, even though these rights have a "distinctly separate nature." (pp. 11, 13 slip opinion, *Alexander* v. *Gardner-Denver, supra*). In another place, pp. 14, 15, Justice Powell, speaking for a unanimous court says "Title VII strictures are absolute" and "are not susceptible to prospective waiver."

Since rights under Title VII are and under the contract between the parties "have legally independent origins and are equally available," it appears that both should proceed independently and in accordance with their own statutory or contractual limitations and requirements. The rationale of *Alexander* v. *Gardner-Denver Co., supra.*, persuades this Court that the 90 day Title VII requirement for filing a claim with the E.E.O.C. after the occurrence of the alleged discriminatory event is not effected or abated or tolled by an independent grievance-arbitration proceeding under a contract. The E.E.O.C., after all, is required by the statute in question to attempt reconciliation and negotiation of the differences before further action is taken. Thus, grievance and conciliation procedures independently would work for a settlement and disposition of the disputes between employer and employee. Whether or not an employee files a grievance, or files an E.E.O.C. charge, he or she still has a separate right to claim 42 U.S.C. § 1981 (1866 Civil Rights Act) violations. *Long* v. *Ford Motor Co.*, ... F.2d ..... (6th Cir. 4-30-74). That employee, however, must abide by applicable statute of limitations requirements as to a Section 1981 claim, just as he or she must abide with contractual or 42 U.S.C. § 2000e-5(e) prerequisites.

Since plaintiffs did not file her claim with the E.E.O.C. within 90 days after her alleged discriminatory discharge, defendant employer's motion to dismiss to the 1964 Civil Rights, Title VII, claim is granted.

This 12th day of June, 1974.

/s/ HARRY W. WELLFORD
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Filed June 19, 1974

DORTHA ALLEN GUY,
Plaintiff,

vs.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION), *et al.*,
Defendants.

No. C-74-165

ORDER ON RECONSIDERATION

The Court on May 30, 1974, entered an order in this case dismissing plaintiff's alleged cause of action under 42 U.S.C. § 1981 and overuling defendant's motion on the question as to whether the filing of her complaint came within the 90 day period after issuance of the right-to-sue letter. (In effect, because it involved a possible factual dispute, it was held to be appropriate to reserve a ruling for a hearing on the merits.) Without then expressly so ruling, the Court indicated that the recent Supreme Court decision of *Alexander* v. *Gardner-Denver Co.*, ... U.S. ....., 94 S.Ct. 1011, 42 L.W. 4214, 1974) "might indicate that the Union contractual grievance and the E.E.O.C. claim, being independent of each other, . . . would not amount to a tolling of nor effect any extension of a [90 day] limitation period. See Johnson v. R.E.A., 489 F.2d 525, 529 (6th Cir. 1973) *reh. denied*, (1974) petition for certiorari applied for."

Plaintiff moved to amend her complaint, and defendant

Robbins & Myers moved the Court to reconsider and formally rule on its motion to dismiss alleging plaintiff's failure to file her charge with E.E.O.C. within 90 days of the happening of the alleged discriminatory act on defendant Robbins & Myers' motion to dismiss and sustaining it on the failure of plaintiff to file a claim with E.E.O.C. within the statutory period. (See the memorandum opinion and order dated June 12, 1974.) Plaintiff has moved that the Court reconsider this opinion, especially in light of *Schiff* v. *Mead Corp.*, 3 EPD#8043 (6th Cir. 1970), unreported. The Court was aware of this decision, however, when it rendered its opinion adverse to plaintiff's contentions. The primary factor involved there was a change of position on the part of E.E.O.C., which influenced the Court[1] to decide that the filing of a contractual grievance might toll the 90 day statutory period described in 42 U.S.C. § 2000e-5(d).[2] The *Schiff* v. *Mead Corp.* case, however, was decided at a time that *Dewey* v. *Reynolds Metals*, 429 F.2d 324 (6th Cir. 1970) affirmed by an equally divided Supreme Court, was considered the law in this Circuit. The *Dewey* rationale was overruled in *Alexander* v. *Gardner-Denver Co., supra.* It was there emphasized that the E.E.O.C. claims and procedures were separate and independent and that action or conduct taken in behalf of one such claim had no preclusive effect on the other. *Johnson* v. *R.E.A., supra,* had held that filing of an E.E.O.C. charge did not toll the statute of limitations on a 42 U.S.C. § 1981 civil rights action. *Long* v. *Ford Motor Co.*, #73-1993, ... F.2d ..... (6th Cir., 4-30-74) held that 42 U.S.C. § 2000e (Title VII) actions and 42 U.S.C. § 1981 are independent of one

[1] (U.S.D.C. N.D., Ohio)

[2] Now amended by the 1972 Equal Employment Opportunity Act.

another, and, as we construe it, that the District Court[3] was correct in holding that the Title VII statutory time requirements for filing a charge were not tolled by the filing of a suit under the 1866 Civil Rights Act. On the other hand, the District Court's findings for the claimant under the latter statute were to be rescinded on remand in light of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973).

On the face of the Title VII statute, the only means of tolling the 90 day period for filing an E.E.O.C. charge after the alleged discriminatory event was (and is) a filing of a charge with equal employment opportunities and discrimination. This plaintiff Guy could not do so, because Tennessee nor Shelby County has any such agency or law authorizing such a body.

After the discharge in question, Guy had a legal right to file a grievance against her employer under the Union contract, provided she adhered to its terms. Whether or not she filed her grievance, plaintiff also had a right within 90 days to file a charge of racial discrimination. Within a year, whether or not she pursued contractual or E.E.O.C. procedures, she had a right to file suit for alleged discrimination under 42 U.S.C. § 1981. Plaintiff failed to to follow through with either of the latter two statutory rights in accordance with applicable time requirements. Defendant's motion to dismiss is proper under these circumstances.

It should be noted that plaintiff did in fact pursue her grievance through three levels unsuccessfully.[4] Furthermore, E.E.O.C. investigated her claim and determined on

[3] (U.S.D.C. E.D., Mich.)

[4] See the findings and conclusions of E.E.O.C. filed as a part of the record in this cause.

November 20, 1973, that "the Commission finds no reason to believe that race was a factor in the decision to discharge . . ." Plaintiff waited until the last day of the 90 days given her, or until the ninetieth day in which to seek the Court's assistance in filing her Title VII suite after having received an adverse determination to her claims since October of 1971. This lack of diligence, in and of itself, might not constitute a bar, *Harris* v. *Walgreen's Dist. Center*, 456 F.2d 588 (6th Cir. 1972), but is indicative of plaintiff's dilatory role in these proceedings throughout. See *Fekete* v. *U.S. Steel*, 424 F.2d 331 (3rd Cir. 1970) as to the effect of a negative E.E.O.C. determination involving "possibilities of sophisticated discrimination . . . because of European ancestral origin" after an arbitrator's reinstatement of claimant with back pay—an entirely different situation from that at bar. Compare *Beverly* v. *Lone Star Lead*, 437 F.2d 1136 (5th Cir. 1971) dealing with this question where plaintiff filed his claim with E.E.O.C. a week after the alleged discriminatory event, and within approximately 20 days after an adverse E.E.O.C. determination, filed his suit in federal court.

Mrs. Guy was not "penalized" for her seeking "to adjust her dispute with her employer through the private machinery of the grievance procedure" as described in *Malone* v. *N. American Rockwell*, 457 F.2d 779 (9th Cir. 1972). That case did not decide whether there had been a continuing act of discrimination for failure to promote, or whether the settlement of a grievance was in itself a discriminatory act with respect to whether claimant had delayed too long in filing a claim with E.E.O.C. after intervening investigation by a state employment opportunities commission. This Court has granted the motion to dismiss upon reconsidera-

tion, because plaintiff, a Union steward, did not comply with Title VII statutory time requirements of filing her E.E.O.C. charge after her termination.

Plaintiff's claims against the employer, Robbins & Myers, must stand dismissed.

/s/ HARRY W. WELLFORD
United States District Court Judge
Date:

APPENDIX D

SECTION 706(d) OF THE CIVIL RIGHTS ACT OF 1964, 78 STAT. 259 (JULY 2, 1964):

"**(d)** A change under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practices occurred. Except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

SECTION 706(e) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED BY THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, P.B.L. 92-261, 86 STAT. 103, 104 (MARCH 24, 1972) 42 U.S.C. § 2000E-5(E)):

"**(e)** A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on

behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

SECTION 14 OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, PUB. L. 92-261, 86 STAT. 103, 113 (MARCH 24, 1972):

"**(14)** The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and to all changes filed thereafter."

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINEWORKERS, AFL-CIO, LOCAL 790,

Petitioner,

v.

ROBBINS & MYERS, INC.,

Respondent.

No. 75-1276

DORTHA ALLEN GUY,

Petitioner,

v.

ROBBINS & MYERS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI IN NO. 75-1264, FILED MARCH 5, 1976
PETITION FOR CERTIORARI IN NO. 75-1276, FILED MARCH 8, 1976
CERTIORARI GRANTED APRIL 26, 1976 IN NOS. 75-1264, 75-1276

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

Nos. 75-1264; 75-1276

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINEWORKERS, AFL-CIO, LOCAL 790,

Petitioner,

v.

ROBBINS & MYERS, INC.,

Respondent.

DORTHA ALLEN GUY,

Petitioner,

v.

ROBBINS & MYERS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX TO APPENDIX

Relevant Docket Entries

DATE	PROCEEDINGS
3–19–75	Plaintiff's Complaint filed with United States District Court for the Western District of Tennessee.
4–11–74	Answer of International Union of Electrical, Radio and Machine Workers, Local 790 filed.
4–29–74	Motion to dismiss filed by Defendant Robbins & Myers, Inc.
5–10–74	Plaintiff's Memorandum in Opposition to Motion to Dismiss filed.
5–30–74	Order dismissing plaintiff's 42 U.S.C. §1981 claim against Robbins & Myers, Inc. and denying dismissal of Plaintiff's Title VII Claim as entered by the District Court.
6– 4–74	Motion to Amend Complaint filed.
6– 7–74	Motion to Reconsider May 30, 1974 Order filed by Robbins & Myers, Inc.
6–10–74	Answer of Robbins & Myers, Inc. filed.
6–12–74	Memorandum Opinion and Order Granting Defendant's Motion to Dismiss Title VII claims entered.
6–14–74	Plaintiff's Motion to Reconsider Order of June 12, 1974, filed.
6–19–74	Order on Motion for Reconsideration entered.
6–22–74	Plaintiff's Motion to Dismiss Complaint as to IUE, Local 790 filed.

Relevant Docket Entries

6–22–74	Joint Motion to Realign IUE as Plaintiff or to Allow IUE to Intervene as Amicus Curiae filed.
6–22–74	Motion Pursuant to Rule 54(B) to Certify Court's Order of June 19, 1974 as Final filed.
7–19–74	Notice of Appeal filed with the United States Court of Appeals for the Sixth Circuit.
7–19–74	Motion of IUE to Realign filed.
8–26–74	Order Realigning IUE as Plaintiff and Dismissing Action against the IUE entered.
8–26–74	Rule 54(B) Certificate signed by District Court.
10–24–75	Opinion of Court of Appeals entered.
12– 9–75	Order of Court of Appeals denying rehearing en banc entered.
3– 5–76	Petition for Writ of Certiorari in No. 75-1264 filed with United States Supreme Court.
3– 8–76	Petition for Writ of Certiorari in No. 75-1276 filed.
4–26–76	Petitions in Nos. 75-1264, 75-1276 granted.

Note Regarding Opinions Printed in the Petitions

Pursuant to the "Memorandum re Printing" of the Clerk, the Opinion, Orders, and Judgments of the Courts Below, having been printed in an Appendix to one of the Petitions for a Writ of Certiorari, will not be reprinted in this Appendix. Those opinions, and their location in the Appendices to the Petitions are as follows:

Opinion	No. 75-1264 Pet. App. Pages	No. 75-1276 Pet. App. Pages
Decision of the United States Court of Appeals for the Sixth entered October 24, 1975	1a–12a	11a–22a
Order of the United States Court of Appeals for the Sixth Circuit, denying rehearing en banc, entered December 9, 1975	13a	23a
Order of the United States District Court for the Western District of Tennessee entered May 30, 1974	14a–19a	—
Opinion of the United States District Court for the Western District of Tennessee entered June 12, 1974	20a–24a	1a– 5a
Opinion of the United States District Court for the Western District of Tennessee entered June 19, 1974	25a–29a	6a–10a

Complaint

[Filed March 19, 1974]

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

CIVIL ACTION NUMBER C-74-165

DORTHA ALLEN GUY,

Plaintiff,

VS.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 790 (AFL-CIO),

Defendants.

(COMPLAINT FOR VIOLATION OF THE CIVIL RIGHTS ACT OF 1866 AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964)

JURISDICTION AND VENUE

1. This action arises under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000-e et seq., as amended by Public Law 92-261, March 24, 1972 and the Civil Rights Act of 1866, 42 U.S.C. § 1981.

2. Jurisdiction of this Court is invoked pursuant to 42 U.S.C. § 2000 (e)5(f)(3) and 28 U.S.C. § 1343(4).

3. The racially discriminatory practices alleged below were and are being committed in, and but for these practices Plaintiff Guy would be employed in the Western District of Tennessee.

PARTIES

4. Plaintiff Dortha Allen Guy is a Black female citizen of the United States and a resident of Memphis, Shelby County, Tennessee.

5. Defendant Robbins & Myers, Inc. (Hunter Fan Division) (hereinafter "Company") is a manufacturer of electrical appliances doing business in the State of Tennessee and the City of Memphis. Defendant Robbins & Myers is an employer within the meaning of 42 U.S.C. § 2000 e-(b) in that the Company is engaged in an industry affecting commerce and employs at least fifteen persons.

6. Defendant International Union of Electrical, Radio and Machine Workers, Local 790 (AFL-CIO) (hereinafter "Union") is a labor organization within the meaning of 42 U.S.C. § 2000 e-(d) in that said Union is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievances, labor disputes, wages rates of pay, hours, and other terms or conditions of employment of the employees of the Company. The Union has at least fifteen members.

CONDITIONS PRECEDENT

7. Plaintiff Guy has fulfilled all conditions precedent to the institution of this action under 42 U.S.C. § 2000 e-5 (f) (1). On February 10, 1972 Plaintiff filed with the United States Equal Opportunity Commission, hereinafter

the "Commission", a timely charge pursuant to 42 U.S.C. § 2000 e-5 (b) and (e). This charge alleged that the Company had discriminated against plaintiff because of her race in that she was terminated while on sick leave, even though she was following established procedures regarding sick leave. By "Letter of Determination" dated November 20, 1973 the Commission informed plaintiff that it had found no reason to believe that race was a factor in the decision to discharge her or that the Union had failed to represent her because of her race. This "Letter" was accompanied by plaintiff's Notice of Right to Sue. On February 20, 1974, within 90 days of receipt of said Letter of Determination and Notice of Right to Sue, plaintiff by filing with this Court a copy of the Right to Sue Notice, sought and was granted an extension of 30 days within which to perfect the filing of this action. This Complaint is timely filed within the 30 day extension granted.

STATEMENT OF FACTS

8. Plaintiff was hired by the Company on November 1, 1968 and remained in its employ until she was terminated on or about October 25, 1971. From October 19, 1971 to October 24, 1971 plaintiff was on sick leave with permission granted by the Company. At the expiration of her sick leave plaintiff was not able to return to work. It was plaintiff's understanding that she would not be permitted to return to work at the Company until released by her physician. Therefore, on or about October 25, 1971 in the early morning plaintiff called the Company and left a message to the effect that she would not return to work as planned but would instead again visit her physician for purposes of further treatment preparatory to being released by said physician. Plaintiff did in fact visit her

physician, was treated by him, and ordered not to return to work. Plaintiff notified the Company by mail, Return Receipt Requested, that she could not return to work as planned because of her physician's orders. At all times throughout her illness plaintiff followed the Company's policy governing illnesses and leave. On October 29, 1971 Plaintiff returned to work and was informed by the Company's Assistant Personnel Manager that she had "voluntarily quit" by failing to return to work on the day following the expiration of her sick leave. Plaintiff disagreed with the Company's determination that she had "voluntarily quit" and accordingly when the Company reported to the Tennessee Department of Employment Security that Plaintiff had voluntarily quit she appealed the Department's initial determination that she was not entitled to unemployment compensation and obtained a ruling that she had not voluntarily quit but was medically unable to return to work and was therefore entitled to unemployment compensation.

9. To plaintiff's knowledge the Company, on at least one other occasion, has reinstated a white employee who under circumstances similar to those of plaintiff failed to return to work upon expiration of leave. Plaintiff alleges that were it not for her race she too would have been reinstated.

10. Plaintiff further alleges that defendant Union failed to insist on reinstatement for plaintiff and that said failure was attributable to her race.

STATEMENT OF CLAIM

11. The defendant Company, its agents and employees have and are engaged in acts and practices which dis-

criminate on the basis of race against plaintiff. These acts and practices include, but are not limited to, the following:

a. Terminating plaintiff because of her race; and

b. Failing to reinstate plaintiff because of her race.

12. The defendant Union, its agents, officers, and employees have and are engaged in acts and practices which discriminate on the basis of her race. The acts and practices complained of herein include, but are not limited to, defendant Union's failure to represent her with the same diligence as that with which white employees in similar situations are represented.

13. The acts and practices alleged in paragraphs 11 and 12 above deprive plaintiff of rights protected by 42 U.S.C. § 2000-e et seq. and by 42 U.S.C. § 1981. Plaintiff has no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for preliminary and permanent injunction is her only means of securing adequate relief. Plaintiff is now suffering and will continue to suffer irreparable injury from the discriminary acts and practices set forth herein. Unless enjoined by order of this Court, the defendants will continue to engage in these or similar acts and practices.

PRAYER

WHEREFORE, plaintiff prays that the defendants, their officers, agents, employees, assigns, successors in office and all persons in active concert or participation with them or any of them be preliminarily and permanently enjoined from engaging in any racially discriminatory employment practice or in any practice or conduct which operate to

continue the effects of past racially discriminatory practices, and specifically from:

1. Failing to reinstate plaintiff Guy to her former position or a position comparable thereto, with backpay, retroactive seniority and other benefits she would have received or been entitled to in absence of discrimination; and

2. Failing to accord or acquiescing in the failure to accord plaintiff Guy the same rights and representation in protesting her termination as accorded white employees in similar situations.

Plaintiff further prays for such additional relief as the cause of justice may require including her costs, disbursements and reasonable attorneys' fees in this action.

Dated this the 19th day of
March, 1974

Respectfully submitted,

/s/ A. C. WHARTON, JR.
A. C. WHARTON, JR.
MEMPHIS AND SHELBY COUNTY
LEGAL SERVICES ASSOCIATION
46 North Third Street
Memphis, Tennessee 38103
(901) 526-5132
Attorney for the Plaintiff

(Affidavit of Service omitted in printing)

Answer

[Filed April 29, 1974]

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title Omitted in Printing]

ANSWER OF DEFENDANT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 790

For its answer to Plaintiff's complaint in this action, Defendant International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, Local 790 (whose true and correct name is as stated herein), hereinafter referred to as Defendant Local 790, admit, deny and allege as follows:

ANSWERING THE COMPLAINT

1. Complaint Paragraph 1: Admitted.

2. Complaint Paragraph 2: Admitted.

3. Complaint Paragraph 3: Denied.

4. Complaint Paragraph 4: Defendant Local 790 admits that Dortha Allen Guy is a black female. Defendant Local 790 denies each and every allegation contained in Paragraph 4 of the complaint not specifically admitted in Paragraph 4 of this answer for want of knowledge.

5. Complaint Paragraph 5: Defendant Local 790 admits that Defendant Robbins & Myers Inc. (Hunter Fan

Answer

Division) hereafter called Defendant Employer, is an "employer" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and does business in the State of Tennessee, City of Memphis. Defendant Local 790 denies each and every allegation contained in Paragraph 5 of the complaint not specifically admitted in Paragraph 5 of this answer.

6. Complaint Paragraph 6: Defendant Local 790 admits that it is a "labor organization" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and has at least fifteen (15) members. Defendant Local 790 denies each and every allegation contained in Paragraph 6 of the complaint not specifically admitted in Paragraph 6 of this answer.

7. Complaint Paragraph 7: Defendant Local 790 admits that Plaintiff filed with the Equal Employment Opportunity Commission on February 20, 1972, a charge alleging that Defendant Employer discriminated against Plaintiff because of her race in that she was terminated while on sick leave even though she was following established procedures regarding sick leave. Defendant Local 790 admits a District Director on behalf of the Equal Employment Opportunity Commission issued a determination letter dated November 20, 1973, in which he found no reason to believe that race was a factor in Defendant Employer's decision to discharge her or that Defendant Local 790 failed to represent her because of her race and that this determination letter was accompanied by a "Notice of Right to Sue" dated November 20, 1973. Defendant Local 790 denies each and every allegation contained in

Answer

Paragraph 7 of the Complaint not specifically admitted in Paragraph 7 of this answer.

8. Complaint Paragraph 8: Defendant Local 790 admits Plaintiff was hired by Defendant Employer on or about November 1, 1968 and was terminated on or about October 25, 1971. Defendant Local 790 denies each and every allegation contained in Paragraph 8 of the complaint not specifically admitted in Paragraph 8 of this answer.

9. Complaint Paragraph 9: Denied.

10. Complaint Paragraph 10: Denied.

11. Complaint Paragraph 11: Denied.

12. Complaint Paragraph 12: Denied.

13. Complaint Paragraph 13: Denied.

FIRST DEFENSE

14. On October 27, 1971, Defendant Local 790 filed a grievance on behalf of Plaintiff and processed said grievance through all steps of the grievance procedure contained in a collective bargaining agreement with Defendant Employer dated September 29, 1969 and effective from September 29, 1969 through August 31, 1972.

SECOND DEFENSE

15. Plaintiff failed and refused to cooperate with Defendant Local 790 in the processing of the grievance set forth in Paragraph 14 of this answer.

Answer

THIRD DEFENSE

16. Defendant Local 790 represented Plaintiff in a fair and impartial manner, in the processing of the grievance set forth in Paragraph 14 of this answer.

FOURTH DEFENSE

17. Defendant Local 790 has previously filed and processed grievances on behalf of Plaintiff which grievances were won by Defendant Local 790.

/s/ RONALD H. JANETZKE
Ronald H. Janetzke
3461 Office Park Drive
Kettering, Ohio 45439
(513) 294-1491
Attorney for Defendant Local 790

RHJ :skp/ope333

(Affidavit of Service omitted in printing)

Motion to Dismiss

[Filed April 29, 1974]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title Omitted in Printing]

Comes now defendant Robbins & Myers, Inc. (Hunter Fan Division), and pursuant to Rule 12 of the Federal Rules of Civil Procedure, respectfully moves this Court to dismiss the action filed herein upon the following grounds:

1. The Court lacks subject matter jurisdiction and the Complaint fails to state a claim against the defendant upon which relief can be granted in that the plaintiff failed to file a timely charge with the Equal Employment Opportunity Commission as required by Section 706(d) of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A., Sec. 2000e-5(d).

2. The Court lacks subject matter jurisdiction and the Complaint fails to state a claim against the defendant upon which relief can be granted in that plaintiff failed to commence this action within the time limitation imposed by Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by Public Law 92-261.

3. The Court lacks subject matter jurisdiction and the Complaint fails to state a claim against the defendant upon which relief can be granted in that plaintiff failed

Motion to Dismiss

to commence this action within the time limitation imposed by Tennessee Code Annotated, Section 28-304.

Respectfully submitted,

McKNIGHT & HUDSON
2222 Clark Tower
Memphis, Tennessee 38137

By /s/ CHARLES A. LAWRENCE, JR.
Charles A. Lawrence, Jr.
Attorneys for Robbins & Myers, Inc. (Hunter Fan Division)

(Certificate of Service omitted in printing)

Memorandum of Facts

[Filed May 10, 1974]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Title Omitted in Printing]

PLAINTIFF'S MEMORANDUM OF FACTS AND LAW IN OPPOSITION TO DEFENDANT COMPANY'S MOTION TO DISMISS

I

INTRODUCTION

On April 29, 1974, defendant, Robbins & Myers Inc., (Hunter Fan Division) filed with this Court a Motion to Dismiss Plaintiff's complaint, on the grounds that:

1. The Court lacks subject matter jurisdiction and the complaint fails to state a claim against the defendant upon which relief can be granted in that the plaintiff failed to file a timely charge with the Equal Employment Opportunity Commission as required by § 706 (d) of Title VII of the Civil Rights Act of 1964, 42 USCA, § 2000 e-5 (d).

2. The Court lacks subject matter jurisdiction and the Complaint fails to state a claim against the defendant upon which relief can be granted in that plaintiff failed to commence this action within the time limitation imposed by § 706 (f) (1) of Title VII of the Civil Rights Act of 1964, as amended by Public Law 92-261.

3. The Court lacks subject matter jurisdiction and the Complaint fails to state a claim against the defendant upon

which relief can be granted in that plaintiff failed to commence this action within the time limitation imposed by Tennessee Code Annotated, § 28-304.

Plaintiff contends that defendant Company's motions are without merit and should be denied.

II

PLAINTIFF FILED WITH THE EEOC
A TIMELY CHARGE OF DISCRIMINATION

A. *The Facts.*

On or about October 25, 1971, plaintiff's employment with the defendant company was terminated. Plaintiff, having been an active member in Local 790 of the International Union of Electrical, Radio and Machine Workers, decided to first attempt to resolve her grievance by resorting to established grievance procedures. Accordingly, on October 27, 1971 a grievance was filed on her behalf with her Union protecting her discharge. A copy of this grievance is attached hereto as Exhibit A. On November 18, 1971 plaintiff's grievance was denied (copy attached). On February 10, 1972 plaintiff filed her charge of discrimination with the Equal Employment Opportunity Commission.

• • •

Attachment A, Annexed to Memorandum of Facts

GRIEVANCE

No. 23480

Name Dortha Guy Dept. Clock No. Date 10-27-71

Protest unfair action of Co. for discharge. Ask that she be reinstated with compensation for lost time.

Employee's Signature ALICE JONES

Date .....

Foreman's Answer

Signed .....

Date .....

Foreman's Answer Unsatisfactory Because:

3rd Step

Employee's Signature .....

Form 40377

Grievance denied.

Grievance No. 1450—Dortha Guy—Termination

Dortha Guy was terminated in accordance with the provisions of the current collective bargaining agreement, specifically Article V, Section 14 (f).

The writer made a personal attempt to contact her physician to determine whether or not she was incapacitated to

Attachment A, Annexed to Memorandum of Facts

the extent that she was unable to renew her leave of absence.

No information was produced to show why Dortha Guy should not be terminated in accordance with Article V, Section 14 (f).

Termination for failure to report back from leave is prerequisite to recalling a junior employee to fill the vacancy created by the non-reporting employee.

Grievance denied.

Yours very truly,

HUNTER FAN AND VENTILATING COMPANY

/s/ C. T. KROGH
C. T. Krogh
Personal Director

CTK/te

Motion to Amend the Complaint

[Filed June 4, 1974]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Title Omitted in Printing]

Comes now the Plaintiff, Dortha Allen Guy, and moves to amend her complaint in the following respect to wit:

Amend Paragraph 7, Conditions Precedent, to read as follows:

Plaintiff contends that by her taking her complaint through established grievance procedures with the International Union of Electrical, Radio and Machine Workers, Local 790 (AFL-CIO) to raise any rights that were due her under the contract tolled the running of the ninety day requirement at two (2) days.

Amend Paragraph 8, Statement of Facts, to read as follows:

. . . Plaintiff further contends that she disagreed with the Company's determination that she had "voluntarily quit" and accordingly when the Company reported to the Tennessee Department of Employment Security that Plaintiff had voluntarily quit she appealed the Department's initial determination that she was not entitled to unemployment compensation and obtained a ruling that she had *not* voluntarily quit but was medically unable to return to work and was therefore entitled to unemployment compensation.

Motion to Amend the Complaint

WHEREFORE, Plaintiff prays that judgment be rendered in her favor upon the foregoing allegations.

Dortha Allen Guy
By /s/ A. C. WHARTON, JR.
A. C. WHARTON, JR.

MEMPHIS-SHELBY COUNTY
LEGAL SERVICES ASSOCIATION
325 Dermon Building
Memphis, Tennessee 38103
526-5132

(Certificate of Service omitted in printing)

Motion to Reconsider

[Filed June 7, 1974]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Title Omitted in Printing]

Defendant Company, Robbins & Myers, Inc. (Hunter Fan Division), respectfully requests that the Court reconsider its Order dated May 30, 1974, to the extent that the Court failed to consider the first ground of Defendant Company's Motion to Dismiss concerning whether plaintiff's action was barred by reason of her failure to file a timely charge with the Equal Employment Opportunity Commission.

The law is well settled that the filing of a timely charge with the Equal Employment Opportunity Commission is a jurisdictional prerequisite for any subsequent action pursuant to Title VII of the Civil Rights Act of 1964. *Alexander* v. *Gardner-Denver Co.*, 94 S. Ct. 1011, 7 EPD, para. 9148 (February 19, 1974); *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (CA5, 1970); *Gordon* v. *Baker Protective Services, Inc.*, 358 F.Supp. 867 (ND Ill., 1973); *Brown* v. *General Electric Co.*, 5 EPD, para. 7990 (MD Tenn., 1972), aff'd. 487 F.2d 1377 (CA6, 1973); *Heard* v. *Mueller Company*, 5 EPD, para. 7960 (ED Tenn., 1971), aff'd. 464 F.2d 190 (CA6, 1972). The facts, as alleged in the Complaint, clearly reveal that plaintiff did not file a charge with the Commission within the ninety (90) day statutory period which was in effect when her alleged cause of action arose. The only argument plaintiff has presented

in an attempt to overcome this jurisdictional defect is that the ninety (90) day period was tolled because of a grievance filed pursuant to a collective bargaining agreement. It is Defendant Company's position, as set forth in its Supplemental Memorandum filed with the Court on May 22, 1974, that the filing of such a grievance does not toll the period for filing a charge with the Commission.

Defendant Company has already expended much time, effort and money in this matter because of grievance procedure meetings, unemployment compensation hearings, and an investigation by the Equal Employment Opportunity Commission. It is respectfully submitted that justice requires that there should be a decision as to whether plaintiff's action is or is not barred by her failure to file a timely charge with the Commission before Defendant is required to expend more time, effort and money in connection with this matter.

Respectfully submitted,

McKNIGHT & HUDSON
Suite 2222 Clark Tower
Memphis, Tennessee 38137

By /s/ CHARLES A. LAWRENCE, JR.
Charles A. Lawrence, Jr.
Attorneys for Robbins & Myers, Inc.
(Hunter Fan Division)

(Certificate of Service omitted in printing)

Answer

[Filed June 10, 1974]

In the United States District Court

For the Western District of Tennessee

Western Division

[Title Omitted in Printing]

Comes now the defendant, Robbins & Myers, Inc. (Hunter Fan Division), and for answer and defense to the Complaint filed in this cause against it states:

I.

Defendant Company denies the allegations contained in Paragraph 1 of the Complaint.

II.

Defendant Company denies the allegations contained in Paragraph 2 of the Complaint.

III.

Defendant Company denies the allegations contained in Paragraph 3 of the Complaint.

IV.

Defendant Company admits the allegations contained in Paragraph 4 of the Complaint.

V.

Defendant Company admits the allegations contained in Paragraph 5 of the Complaint.

Answer

VI.

Defendant Company admits the allegations of Paragraph 6 of the Complaint concerning the fact that Defendant Union has at least fifteen (15) members and is a labor organization within the meaning of Title VII of the Civil Rights Act of 1964, as amended. All other allegations contained in Paragraph 6 of the Complaint are denied.

VII.

In response to Paragraph 7 of the Complaint, Defendant Company admits that plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission on February 10, 1972; that the Commission informed plaintiff by "Letter of Determination" dated November 20, 1973, that the Commission has found no reason to believe that race was a factor in plaintiff's termination of employment with Defendant Company or in Defendant Union's handling of her grievance; and, that the Commission provided plaintiff with a "Notice of Right to Sue" with the November 20, 1973 "Letter of Determination". Defendant Company is without sufficient knowledge to answer the allegations concerning the purported filing of plaintiff's "Notice of Right to Sue" with the Court and the purported extension of time to file this action. All other allegations contained in Paragraph 7 of the Complaint are denied.

VIII.

In response to Paragraph 8 of the Complaint, Defendant Company admits that plaintiff was in its employ from November 1, 1968 until October 25, 1971; that plaintiff was on a sick leave granted by Defendant Company from October 19, 1971 to October 24, 1971; that plaintiff returned to Defendant Company on October 29, 1971 and was advised

that she was considered to have voluntarily quit; that plaintiff appealed the initial determination of the Tennessee Department of Employment Security that plaintiff was not entitled to unemployment compensation; and, that plaintiff was subsequently awarded unemployment compensation. Defendant Company is without sufficient knowledge at this time to answer the remaining allegations contained in Paragraph 8 of the Complaint.

IX.

Defendant Company denies the allegations contained in Paragraph 9 of the Complaint.

X.

Defendant Company denies the allegations contained in Paragraph 10 of the Complaint.

XI.

Defendant Company denies the allegations contained in Paragraph 11 of the Complaint.

XII.

Defendant Company denies the allegations contained in Paragraph 12 of the Complaint.

XIII.

Defendant Company denies the allegations contained in Paragraph 13 of the Complaint.

FIRST DEFENSE

This Court lacks jurisdiction over the subject matter of this action.

SECOND DEFENSE

The Complaint fails to state a claim against the Defendant Company upon which relief can be granted.

THIRD DEFENSE

The Complaint fails to allege facts sufficient for the awarding of the extraordinary relief of a preliminary and permanent injunction.

FOURTH DEFENSE

The Plaintiff is barred from bringing this action by her failure to comply with the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sec. 2000e, *et seq.*

FIFTH DEFENSE

The Plaintiff's action is barred by laches on the part of the Plaintiff.

SIXTH DEFENSE

The Plaintiff's action is barred by the applicable Tennessee state statute of limitations.

WHEREFORE, Defendant Company prays that the Complaint herein be dismissed with costs, including reasonable attorneys' fees herein expended, assessed against the Plaintiff.

McKNIGHT & HUDSON
Attorneys for Defendant
Suite 2222 Clark Tower
Memphis, Tennessee 38137

By /s/ FLETCHER L. HUDSON
Fletcher L. Hudson

/s/ CHARLES A. LAWRENCE, JR.
Charles A. Lawrence, Jr.

(Certificate of Service omitted in printing)

Motion to Reconsider

[Filed June 14, 1974]

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

On or about June 7, 1974 defendant Company entered a Motion to Reconsider the Court's Order dated May 30, 1974. This Motion was served on counsel for the plaintiff on June 10, or June 11, 1974. Plaintiff's counsel immediately undertook to prepare written opposition to the Motion to Reconsider. However, on June 12, 1974, the Court entered its Memorandum Opinion and Order granting the defendant's Motion to Dismiss. Plaintiff was therefore deprived of an opportunity to respond to the Motion to Reconsider by the entering of the Court's Order prior to the expiration of the time allowed by Rule 9-A of the Rules of the United States District Court for the Western District of Tennessee which expressly provide "the response to the Motion shall be filed within ten (10) days after service of the Motion. . ." Therefore, the Court's entering of its Order before the expiration of the ten (10) days allowed under Rule 9 unjustly deprived plaintiff of an opportunity to respond. While the plaintiff is very much appreciative of the Court's expeditious treatment of this matter, she is not so appreciative as to allow her arguments to be given short shrift and treated in such a manner that fail to give even passing notice to the precedent cited in plaintiff's arguments against the Motion to Reconsider.

Additionally, those points on which the Court based its Order granting the Motion to Dismiss were for the most

part addressed in the response that plaintiff was preparing at the time the Order dismissing the Complaint was received. It is submitted that plaintiff is entitled, both by simple notions of justice and by the local rules, to have these arguments heard.

Furthermore, it appears that the Order granting the Motion to Dismiss introduces new arguments which have not been raised either by plaintiff or defendant, particularly the idea of a continuing violation. This argument certainly has not been raised by plaintiff and in no way does plaintiff at this time rely on such an argument. To the extent that the Court order dismissing the Complaint was based on such a theory we would respectfully submit that such reliance is misplaced. Our position is that so aptly described by the Sixth Circuit Court of Appeals in the case of *Schiff* v. *Mead Corp.*, —— F.2d —— 3 EPD #8043, (6th Cir., 1970), which we again reiterate should be controlling and dispositive of the issue now before this Court.

For all of the foregoing reasons plaintiff respectfully requests this Court to reconsider its Order of June 12, 1974 dismissing plaintiff's Complaint. Plaintiff also requests that oral argument be held on this matter.

Respectfully submitted,

/s/ A. C. WHARTON, JR.
A. C. WHARTON, JR.
Attorney for Plaintiff
MEMPHIS AND SHELBY COUNTY
LEGAL SERVICES ASSOCIATION
46 North Third Street
325 Dermon Building
Memphis, Tennessee 38103
526-5132

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Motion to Dismiss the Complaint

[Filed June 22, 1974]

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

[Title Omitted in Printing]

MOTION TO DISMISS COMPLAINT AS TO DEFENDANT INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, LOCAL 790 (AFL-CIO)

Now comes Dortha Guy, plaintiff herein, through her attorney and pursuant to Rule 41 (a)(2) respectfully moves this Court to enter an Order dismissing plaintiff's complaint as to defendant International Union of Electrical, Radio, and Machine Workers, Local 790 (AFL-CIO). The reason for plaintiff's Motion to Dismiss are set forth in the points and authorities attached hereto.

/s/ A. C. WHARTON, JR.
A. C. Wharton, Jr.
Attorney for Plaintiff
Memphis and Shelby County
Legal Service Association
46 North Third Street
325 Dermon Building
Memphis, Tennessee 38103
526-5132

(Certificate of service omitted in printing)

Motion to Realign

[Filed June 22, 1974]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title Omitted in Printing]

MOTION TO REALIGN DEFENDANT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 790 (AFL-CIO) AS PARTY PLAINTIFF

OR

IN THE ALTERNATIVE, MOTION TO ALLOW DEFENDANT UNION TO INTERVENE AS AMICUS CURIAE

Now comes Dortha Guy, plaintiff herein, and the International Union of Electrical, Radio and Machine Workers, Local 790 (AFL-CIO), defendant herein and respectfully move this Court to enter an Order realigning defendant Union as a party plaintiff in this matter so as to permit defendant Union to participate in the appeal of the Court's June 19th Order dismissing the complaint as to the defendant Company on the grounds that the filing of the plaintiff's grievance with defendant Union did not toll the running of the time limit within which plaintiff's charge of discrimination was to have been filed with the Equal Employment Opportunity Commission; or in the alternative enter an Order allowing said Union to intervene and par-

ticipate as amicus curiae on behalf of plaintiff, Dortha Guy on the above issue.

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Attorney for Plaintiff
Memphis and Shelby County
Legal Services Association
46 North Third Street
Memphis, Tennessee 38103

Ronald H. Janetzke
General Counsel
International Union of Electrical,
Radio, and Machine Workers,
AFL-CIO-CLC
3461 Office Park Drive
Kettering, Ohio 45439

(Certificate of Service omitted in printing)

Motion Pursuant to Rule 54(b)

[Filed June 22, 1974]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Title Omitted in Printing]

MOTION PURSUANT TO RULE 54 (b) TO CERTIFY COURT'S ORDER OF JUNE 19, 1974 AS FINAL

Now comes plaintiff, Dortha Guy, through her attorney and respectfully moves the Court to enter an Order certifying its Order of June 19, 1974 dismissing plaintiff's complaint as to defendant Robbins and Myers as final and appealable as required by Rule 54 (b) of the Federal Rules of Civil Procedure. The reasons for plaintiff's Motion are more fully set forth in the Points and Authorities attached hereto.

Respectfully submitted,

/s/ A. C. Wharton, Jr.
A. C. Wharton, Jr.
Attorney for Plaintiff
Memphis and Shelby County
Legal Service Association
46 North Third Street
Memphis, Tennessee 38103

(Certificate of Service omitted in printing)

Defendant Union's Motion to Realign

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

[Title Omitted in Printing]

DEFENDANT UNION'S MOTION TO REALIGN DEFENDANT INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, LOCAL 790 AS PARTY PLAINTIFF OR IN THE ALTERNATIVE TO ALLOW DEFENDANT UNION TO INTERVENE AS AMICUS CURIAE

Defendant International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC Local 790 (hereafter called Defendant Local 790) moves the Court for leave to be realigned as a party plaintiff in order for said Defendant Union to participate in appeal of the Court's decision to dismiss this case for failure to file a timely charge with the EEOC with the right to be served with copies of all pleadings and briefs, to file appropriate pleadings or briefs, and to fully participate in the appeal by Plaintiff.

1. Defendant Local 790 has an interest in the issue which will be before the Court of Appeals which interest is aligned with that of Plaintiff.

2. Defendant Local 790 is the duly certified and recognized collective bargaining agent for a unit of production and maintenance employees at the Defendant Employer's plant in Memphis, Tennessee, which is the plant named in the complaint herein.

3. Defendant Local 790 has at all times endeavored to protect all unit employees whom they represent from discrimination because of race and to that end negotiated a collective bargaining agreement with Defendant Employer which provides:

Article XXXI—NO DISCRIMINATION

Section 1. The provisions of this contract shall be applied to all employees without discrimination by either the Company or the Union on account of sex, race, color, creed, or national origin. The parties further agree to comply with the provisions of the Age Discrimination in Employment Act of 1967.

3. Defendant Local 790 has negotiated in its agreement with Defendant Employer a grievance and arbitration procedure which it encourages employees to use when Defendant Employer violates the collective bargaining agreement. The grievance and arbitration procedures of the contract provides as follows:

Article XVIII—GRIEVANCE PROCEDURE

Section 1. All differences, disputes and grievances that may arise after the signing of this Agreement between the Union, any employee or group of employees, and the Company concerning the application or interpretation of this Agreement shall be settled in the following manner:

Step 1. Between the employee on one hand and the employee's foreman on the other. If the employee requests his Steward be present, the foreman will send for him without undue delay. The fore-

man shall give his answer to the complaint within twenty-four (24) hours from the time it was referred to him. If the foreman's answer is unsatisfactory, the Steward will present a written grievance and the foreman shall give his answer in writing the following workday. If the grievance is not appealed in writing and stating reasons for appeal on the grievance form to the next step within four (4) working days, it will be considered settled at this step.

Step 2. Between the Departmental Steward, the Chief Steward on the one hand, and the General Foreman or his designated representative and the line foreman on the other. Should the Chief Steward be absent from the plant, the president of the Union shall be called to this meeting which shall be held within one (1) week after the grievance has been properly appealed in writing to this step. If requested by either party, the aggrieved employee may be present. If no satisfactory settlement is reached within twenty-four (24) hours after the meeting in this step, the grievance shall be appealed to Step 3 in writing within four (4) working days or it will be considered settled at this step.

Step 3. Between the Union Officers (Sec. 9, Article V) on the one hand, and representatives of management on the other. The International Union representative may attend these meetings. The Company will give written answers to grievances within ten (10) work days after this step.

Step 4. Grievances involving a claimed violation of a specific provision of this Agreement may be referred to arbitration by the Union if not satisfactorily adjusted in Step 3 above by giving the Company written notice within ten (10) days of Company's final decision in Step 3.

The parties shall select an Arbitrator by mutual agreement. If no agreement is reached within five (5) working days from the date of the request for arbitration, the parties shall request a panel of arbitrators from the Federal Mediation and Concilation Service. If the parties cannot select an Arbitrator from this panel within thirty (30) days, they shall request a second panel of arbitrators from the Federal Mediation and Conciliation Service, and from this panel each party shall strike an even number of names and the remaining name shall be the Arbitrator. The expense of the Arbitrator shall be equally divided between the Union and the Company. The impartial arbitrator shall have no power to change or modify the terms of this Agreement or to make any additions thereto.

Arbitration proceedings shall be held during working hours, but the Company shall not pay any of the participants for the Union. The decision of the Arbitrator shall be final and binding upon both parties.

Section 2. In the event a grievance arises between an employee and the Company, the employee shall submit a grievance to the Company within five (5) working days of the commission of the act originating the grievance. Grievances which are submitted after five (5) working days of the commission of the act originating the grievance will be accepted if the employee can prove circumstances beyond his control prevented knowledge of the act originating the grievance.

Section 3. Two (2) representatives of the International Union (IUE-AFL-CIO) will, upon request,

be admitted to the plant to check on a specific grievance after no agreement is reached at Step 2.

Defendant Local 790 is interested to see that its members' rights to use their contractual grievance procedure is maintained and protected.

4. Defendant Local 790 believes its presence in this suit as a party plaintiff for purposes of the appeal will be of assistance to the Courts and to all parties in having the representative of unit employees before the Court.

/s/ Ronald H. Janetzke
Ronald H. Janetzke
Attorney for Defendant
IUE-AFL-CIO-CLC
Local 790
3461 Office Park Drive
Kettering, Ohio 45439
(513) 294-1491

RHJ:skp/ope333

Order

[Filed August 26, 1974]

In the United States District Court
For the Western District of Tennessee
Western Division

[Title Omitted in Printing]

This Court entered an Order on June 19, 1974, dismissing plaintiff's complaint as to defendant company, Robbins & Myers, Inc. Plaintiff now moves this Court to dismiss the remaining defendant, International Union of Electrical, Radio and Machine Workers, Local 790 (AFL-CIO).

It appears to the Court that the plaintiff and Union have agreed that this action should be dismissed against the Union. Therefore, on this basis, this Court dismisses plaintiff's action against defendant Union.

Additionally, plaintiff and defendant Union request an Order realigning defendant Union as a party plaintiff for purposes of appeal of this Court's June 19, 1974, Order dismissing the cause against defendant Robbins and Myers, Inc. Robbins & Myers was dismissed on the ground that the filing of plaintiff's grievance with the Union did not toll the statutory time limit within which she is permitted to file a claim with the Equal Employment Opportunity Commission under the Act sued upon.

Since it appears to the Court that both plaintiff and the Union if realigned now have a substantial interest in the issue involved in this appeal, this Court Orders that defendant Union be realigned as a party plaintiff for purposes of the appeal of this Court's Order of June 19, 1974, dis-

Order

missing Robbins & Myers, Inc., as a defendant. An order under F.R.C.P. 54(b) is being entered accordingly.

This ..... day of August, 1974.

/s/ HARRY W. WELLFORD
Harry W. Wellford
United States District Court Judge

Rule 54 (b) Certificate

[Filed August 26, 1974]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

[Title Omitted in Printing]

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that with respect to the issues determined by this Court's Order of June 19, 1974 on plaintiff's claim against defendant Robbins & Myers, Inc. and to which this certificate is appended, be and hereby is CERTIFIED, in accordance with Rule 54 (b), Federal Rules Civil Procedure:

(1) That the Court has directed the entry of final judgment in favor of defendant Robbins and Myers and against plaintiff Dortha Guy; and

(2) That the Court has determined that there is no just reason for delay.

/s/ HARRY W. WELLFORD
District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1276

DORTHA ALLEN GUY,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1276

DORTHA ALLEN GUY,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Respondent Robbins & Myers, Inc. (Hunter Fan Division) files this single brief in opposition to the Petitions for a Writ of Certiorari filed by Dortha Allen Guy in No. 75-1276 and by the International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 in No. 75-1264.

QUESTION PRESENTED

Whether Petitioner has met the jurisdictional prerequisite necessary for maintenance of a court action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(d), by filing a timely charge with the Equal Employment Opportunity Commission within ninety (90) days from the alleged discriminatory act?

STATEMENT OF THE CASE

While Petitioners' statements of the case are generally accurate, they do contain certain misstatements which Respondent wishes to correct. Paramount among these misstatements is Petitioners' assertion that the Company's decision with regard to Ms. Guy's termination did not become final until the completion of the grievance process (Petition in No. 75-1276, p. 6). This statement is not accurate, and there is absolutely no evidence in the record below to support such an assertion.

Furthermore, Respondent does not agree with statements concerning the decision of the Sixth Circuit as to the retroactivity of the 1972 Amendments to Title VII, 42 U.S.C. § 2000e-5(e). The Court did not decide this issue because it was not properly before the Court. It was clearly stated by the Court that as the issue was not raised in the District Court, the Court of Appeals was not required to consider it. While the Court of Appeals did express their ideas on this issue, it was not a holding in the case. Indeed, if the Sixth Circuit had considered this issue properly before it, they undoubtedly would have remanded the issue to the District Court for its consideration.

REASONS FOR DENYING A WRIT

I. There Is No Real Conflict With Other Courts of Appeals Decisions as to Whether the Pendency of a Grievance Tolls the Limitation Period for Filing a Title VII Charge.

Petitioners state that the Sixth Circuit's holding that the pendency of a grievance does not toll the time limitation for filing a Title VII charge conflicts with decisions of the Fifth, Seventh, Ninth, and Tenth Circuits.[1] With the exception of *Sanchez v. Trans World Airlines, Inc.*, 499 F.2d 1107 (10th Cir. 1974), all of the Circuit decisions relied upon by Petitioners were decided prior to the decision of the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), a decision clearly indicating that the limitation period of Title VII is *not* tolled by pursuit of a contractual grievance procedure.

In the one case decided subsequent to *Alexander v. Gardner-Denver Co.*, *Sanchez v. T.W.A.*, *supra*, the Tenth Circuit, contrary to Petitioners' assertion, does not hold that the time for filing a Title VII charge is tolled by the filing of a grievance. The issue before the Tenth Circuit in *Sanchez* was whether resort to arbitration bars subsequent court action pursuant to Title VII. The Tenth Circuit reversed the trial court's holding that the court action was barred. The question as to whether the pendency of a grievance tolls the time period for filing a charge with the Equal Employment Opportunity Commission (EEOC) was not relied upon by the trial court as a basis for its judgment and was raised by defendant-appellee before the Court of Appeals merely as an additional ground for affirming the trial court's

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[1] Cases cited by Petitioners are: *Culpepper v. Reynolds Metals Company*, 421 F.2d 888 (5th Cir. 1970); *Hutchings v. United States Industries, Inc.*, 428 F.2d 303 (5th Cir. 1970); *Moore v. Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972); *Malone v. North American Rockwell Corporation*, 475 F.2d 799 (9th Cir. 1972); *Sanchez v. Trans World Airlines, Inc.*, 499 F.2d 1107 (10th Cir. 1974).

judgment. The Tenth Circuit did not decide this issue but remanded it to the trial court for determination as the record did not disclose the date the grievance procedure was commenced or the date proceedings were completed.

Thus, the question presented in the instant case has never been squarely posed before the Tenth Circuit and has not been decided by that Court of Appeals. Although the Tenth Circuit expressed the view that the tolling rule was "in tune with the construction given by the Supreme Court and other federal courts to this kind of provision", the Court cites no Supreme Court case in support of its statement and cites only those Court of Appeals decisions which were decided prior to *Alexander v. Gardner-Denver Co.* The principles enunciated by the Supreme Court in *Alexander v. Gardner-Denver Co.* and *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973) *aff'd* 421 U.S. 454 (1975),[2] a case decided subsequent to *Sanchez v. T.W.A.*, make it clear that the legal remedies available for employment discrimination are "separate, distinct, and independent"[3] and the limitation periods for bringing actions under these various remedies should not affect or toll one another.

At the time *Sanchez* was decided, the Tenth Circuit did not have the benefit of the Supreme Court's elucidation on the tolling question as it relates to the various remedies, and at the time the Fifth, Seventh and Ninth Circuits issued their opinions on tolling, *Alexander v. Gardner-Denver Co.* had not been decided. The Sixth Circuit is, therefore, the only Court of Appeals which has decided the instant question subsequent to the Supreme Court's enunciations in both *Alexander v. Gardner-Denver Co.* and *Johnson v. R.E.A., Inc.*, and the holding of the

[2] The Supreme Court in *Johnson v. Railway Express Agency, Inc.* held that a charge filed with the EEOC does not toll the running of the limitation period for a court action brought under 42 U.S.C. Section 1981.

[3] *Johnson v. Railway Express Agency, Inc.*, 95 S. Ct. 1716, 1721.

Sixth Circuit is consistent with the principles expressed in these two cases.

In light of these recent Supreme Court decisions, this Court cannot assume the other circuits if presently faced with the instant question would continue to adhere to their previous views. Until the other Courts of Appeals carefully consider and decide the instant issue in light of the principles set forth in *Alexander v. Gardner-Denver Co.* and *Johnson v. R.E.A., Inc.* it cannot be said that a conflict exists among the circuits as to whether the pendency of a grievance tolls the limitation period for filing a Title VII charge.[4]

[4] Petitioner in No. 75-1276 requests alternatively that the instant case be held pending resolution by the Supreme Court of *McDonald v. Santa Fe Transportation Company*, 513 F.2d 90 (5th Cir. 1975) *cert. granted* 46 L.Ed. 2d 248 (1975); *Brown v. General Services Administration*, 507 F.2d 1300 (2d Cir. 1974) *cert. granted* 421 U.S. 987 (1975); and *Place v. Weinberger*, 497 F.2d 412 *cert. denied* 419 U.S. 1040 (1974). However, none of these cases concerns the question at hand. *McDonald*, for example, is readily distinguishable from the present case. In *McDonald* the Fifth Circuit held that 42 U.S.C., Section 1981 confers no actionable right on white persons and that discharge of white employees for misappropriation of company property, a charge not alleged by plaintiffs to be false, while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII. Because of the differences between the two cases, it is possible for the Supreme Court to dispose of *McDonald* without necessarily deciding the issue presented in the present case.

Both *Brown* and *Place* raise the issue of whether 42 U.S.C., Section 2000e-16(c), which allowed federal employees for the first time to bring suit in federal court for employment discrimination, may be applied to claims of discrimination which arose before its effective date but were awaiting final determination at that time. Thus, both cases revolve around the applicability of the doctrine of sovereign immunity, an issue in no way involved in the present case.

II. The Issue Raised by Petitioner Regarding the Retroactivity of the 1972 Amendments Does Not Warrant Review by This Court.

The issue of whether the 1972 amendments to Title VII, 42 U.S.C. § 2000e-5(e), may be applied retroactively so as to give the EEOC jurisdiction over Petitioner's claim is not properly before this Court and should not be reviewed. This issue was raised for the first time by the EEOC as *amicus curiae* in its brief to the Sixth Circuit Court of Appeals. The Complaint in this case contains no averment relating to the retroactivity of the 1972 amendments nor was the question litigated at the trial level. The Sixth Circuit held that as the issue of retroactivity was not raised in the District Court the Court did not have to decide this issue.[5]

The Supreme Court has long recognized that unless there are exceptional circumstances, only those questions which were definitively raised and litigated below may be reviewed. *Blair v. Oesterlein Co.*, 275 U.S. 220 (1927); *McGrath v. Manufacturing Trust Co.*, 338 U.S. 241 (1949); *California v. Taylor*, 353 U.S. 553 (1957). It is clear that the issue of retroactivity was never properly raised or litigated, and as there are no exceptional circumstances in this case, there is nothing to warrant the Supreme Court's review of this issue.

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[5] By way of dicta, the Sixth Circuit noted that as Petitioner's claim was barred and extinguished prior to the effective date of the 1972 amendments, the increase of time to file charges allowed by these amendments could not revive Petitioner's claim. Petitioners argue that this is contrary to the Ninth Circuit's holding in *Davis v. Valley Distributing Co.*, 522 F.2d 827 (1975); however, *Davis* is distinguishable from the instant case. In *Davis*, plaintiff filed his charge on March 14, 1972 with the EEOC, which referred the charge to the Arizona Commission on March 29, 1972. Two days later the Arizona Commission returned the charge to the EEOC without further action. The Ninth Circuit held that as appellant's claim was not formally filed until the EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, the charge fell within the literal words of the 1972 statute making the amendments applicable to all charges filed after the effective date March 24, 1972.

CONCLUSION

The holding of the Sixth Circuit is correct and consistent with applicable decisions of the Supreme Court. As there is no conflict among the circuits as to the tolling question and as the retroactivity issue is not properly before this Court, it is respectfully requested that the Petitions for a Writ of Certiorari be denied.

Respectfully submitted

FLETCHER L. HUDSON
CHARLES A. LAWRENCE, JR.
DONNA K. FISHER

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Memphis, Tennessee 38137
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Certificate of Service

I hereby certify that on April 2, 1976, three copies each of the foregoing were mailed, air mail postage prepaid, to counsel of record, Barry L. Goldstein, 10 Columbus Circle, New York, New York 10019 and Ruth Weyand, 1126 Sixteenth Street N. W., Washington, D. C. 20036.

Charles A. Lawrence, Jr.

No. 75-1264

Supreme Court of the United States

OCTOBER TERM, 1975

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790,

Petitioner,

v.

ROBBINS & MYERS, INC., ET AL.,

Respondents.

BRIEF FOR PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 525 F.2d 124, and is attached to the Petition for Writ of Certiorari in this case as Appendix A (Pet. App. 1a-12a).[1] The Order of the Court of Appeals denying rehearing, entered on December 9, 1975, appears at Pet. App. 13a. The opinions

[1] References to the appendices to the Petition for a Writ of Certiorari appear herein as "Pet. App." References to the Joint Appendix appear as "App."

of the District Court are not officially reported, are unofficially reported at 8 FEP Cases 309, 311, and 313, and appear at Pet. App. 14a-29a.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1975. A timely petition for rehearing was denied on December 9, 1975 (Pet. App. 13a), and the petition for certiorari was filed on March 5, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a union member may be denied access to the administrative and judicial remedies for employment discrimination provided by Title VII of the Civil Rights Act of 1964 for failure to file a charge with the Equal Employment Opportunity Commission within the time limit set by 42 U.S.C. 2000e-5, if such a charge was filed within the requisite time period as calculated from the final denial of a grievance properly pursued under a collective bargaining agreement in force?

2. Whether the 1972 Amendments to Title VII, extending from 90 to 180 days the time for filing a charge with the EEOC, rendered timely any charge before the EEOC on the effective date of the Amendments and alleging discriminatory acts less than 180 days before that date?

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are attached hereto as Appendix A (1a-3a):

(1) Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964).

(2) Section 706(b) and (e) of the Civil Rights Act of 1964, as amended by § 4(a) of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 104 (March 24, 1972) (42 U.S.C. § 2000e-5(e)).

(3) Section 14 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 113 (March 24, 1972).

(4) Sections 201 and 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 152, 153 (June 23, 1947) (29 U.S.C. §§ 171 and 173(d)).

STATEMENT OF THE CASE

A. *The Facts*

Dortha Guy is a black woman who was employed by respondent Robbins & Myers, Inc. ("the Company") (App. 6a, 12a, 25a). She was a member of the petitioner, Local 790 of the International Union of Electrical, Radio and Machine Workers ("IUE" or "the Union"), the exclusive bargaining representative of all production and maintenance employees of the Company, and at the time of the events which precipitated this lawsuit was a union steward (App. 17a, 29a). In her capacity as a steward, she was responsible for the filing of grievances under the collective bargaining agreement on behalf of her fellow employees (App. 36a).[2]

In October, 1971, Ms. Guy was absent from work because

[2] The collective bargaining agreement in force provided a three-step grievance procedure for "[a]ll differences, disputes, and grievances that may arise after the signing of this Agreement between the Union, any employee or group of employees, and the company concerning the application or interpretation of this Agreement." A fourth step, arbitration, was provided for grievances "involving a claimed violation of a specific provision of this Agreement" (App. 36a-37a).

of authorized sick leave. Although she was scheduled to return to work on October 24, 1971 she did not return on that day (Pet. App. 20a). The following day the Company discharged her on the ground that she had not complied with procedures embodied in the collective bargaining agreement pertaining to return from leaves of absence (App. 6a-7a, Appendix B, p. 5a, *infra*).[3] A grievance protesting the "unfair action" of the Company in discharging her was filed on October 27, 1971 (App. 18a). Thereafter, the Union processed the grievance through the first three steps of the grievance procedure.[4] The Company denied the grievance at the third step on November 18, 1971, and Ms. Guy decided not to pursue it further (App. 3a, 17a).[5]

[3] Appendix B hereto (pp. 4a-6a) is the EEOC Determination on Ms. Guy's charge, Case No. YME4-155. This Determination was "filed as part of the record in this cause" (Pet. App. 27a) but inadvertantly omitted from the Joint Appendix.

[4] The third step of the grievance procedure took place "[b]etween the Union Officers • • • and representatives of management." (App. 36a.)

[5] As noted, the grievance stated simply that the discharge was "unfair." The collective bargaining agreement had, in addition to provisions substantively governing leaves of absence, return therefrom, and discharges, a section prohibiting discrimination in the application of the contract "on account of sex, race, color, creed, or national origin." (App. 35a.) Ms. Guy's contention before the Equal Employment Opportunity Commission ("EEOC") was that her discharge was not proper under the substantive provisions governing leaves of absence as interpreted with regard to other employees, and that the true reason for her discharge was racial discrimination. (App. 11a, Appendix B, pp. 4a-5a, *infra*.) The extent to which her grievance was articulated in this way through the grievance steps pursued on her behalf, and whether or not the anti-discrimination clause was explicitly relied on through those steps, does not appear in the record as it now exists. Moreover,

On February 10, 1972—108 days after the effective date of her discharge, but less than 90 days after the completion of the grievance procedure—Ms. Guy filed a charge of racial discrimination with the EEOC against both the Company and the Union relating to her discharge (App. 5a, 25a, Pet. App. 21a). The EEOC determined that "the timeliness and all other jurisdictional requirements have been met" (Appendix B, p. 4a, *infra*.), investigated the charge, and found no probable cause to believe that either the Company or the Union had engaged in racial discrimination with regard to Ms. Guy (*Id.*, p. 6a, *infra*), and issued a

nothing appears in the record to demonstrate the extent to which specificity in the written grievance was required in the grievance-arbitration procedure. It is a well established principle of arbitration procedure that a general statement of the incident complained about is sufficient to permit raising any claim based on the agreement at the various steps of the procedure. See *Capital Airlines, Inc.*, 30 LA 836, 839 (William H. Coburn, 1958); *Charles Eneu Johnson Co., Inc.*, 17 LA 125, 129 (A. Langley Coffey, 1950); *Firestone Tire & Rubber Co.*, 20 LA 880, 882 (George A. Gorder, 1953); *Harvard Mfg. Co.*, 51 LA 1098, 1100 (Samuel S. Kates, 1968); *Petroleum Chemicals Inc.*, 37 LA 42, 46 (Paul M. Hebert, 1961); *Hayes Aircraft Corp.*, 33 LA 847, 850 (John A. Griffin, 1959); *Vulcan Mold & Iron Co.*, 40 LA 1266, 1270-1272 (John F. Sembower, 1963); *Package Machinery Co.*, 41 LA 47, 48-49 (James V. Altieri, 1963); *Associated Transcript Inc.*, 50 LA 236, 238-239 (Bernard Dunau, 1968). The statement on the grievance form, as occurred here (App. 18a), that the discharge was "unfair," embraces all forms of unfairness, including race discrimination. The Company's contention throughout the lower court proceedings was that the pursuit of the grievance procedure could have no effect in any circumstance upon the time limit for filing a Title VII charge with the EEOC (App. 23a), and the motion to dismiss was granted on this basis (Pet. App. 24a, 29a). Consequently, it never became material to inquire further into the precise basis for the grievance.

"right to sue" letter on November 20, 1973.[6] Ms. Guy then instituted this lawsuit under 42 U.S.C. § 2000e-5 (App. 4a).

B. *District Court Proceedings*

The Company moved to dismiss on several grounds, including the ground that the suit was barred because the EEOC charge was not filed within 90 days of the discharge (App. 14a).[7] The District Court noted that the charge was filed less than 90 days from the termination of the grievance procedure, and that several Courts of Appeals had held that the time for filing an EEOC charge should be adjusted so as not to take into account the period of pendency of a formal grievance pursued in accord with a collective bargaining agreement (Pet. App. 21a, 22a).[8] But

[6] A finding of no probable cause is not a bar to a private suit under Title VII. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 n. 8.

[7] At the time Ms. Guy was terminated, and at the time she filed her EEOC charge, the time limit for filing an EEOC charge was 90 days. Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964) (Pet. App. 30a). The time limit was extended to 180 days as of March 24, 1972, and the section dealing with that time limit was renumbered as § 706(e). Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, 42 U.S.C. § 2000e-5(e).

[8] *Culpepper* v. *Reynolds Metal Co.*, 42 F.2d 888 (5th Cir. 1970); (see also *Hutchings* v. *U.S. Industries*, 428 F.2d 303 (5th Cir. 1970)); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972). As the District Court recognized (Pet. App. 26a), the Sixth Circuit seems to have adhered to the *Culpepper* rule for a time. *Schiff* v. *Mead Corp.*, 2 FEP Cases 1089 (6th Cir. 1970). Two days after the District's Court's final opinion in this case, another Court of Appeals adopted the rule of the *Culpepper* line of cases. *Sanchez* v. *TWA*, 499 F.2d 1107 (10th Cir. 1974).

the court, noting that "'a typical lay-off, *without more* * * * is a completed act at the time it occurs, so that a [Title VII] charge alleging a discriminatory lay-off must *ordinarily* be filed within 90 days thereafter,' (*Sciaraffa* v. *Oxford Paper Co.*, 310 F.Supp. 891 (D. Me 1970; emphasis added)" (Pet. App. 21a), held that this rule "is not [affected] or abated or tolled by an independent grievance arbitration procedure under a contract" (Pet. App. 24a), and granted the motion to dismiss. The court regarded the rationale of the earlier court of appeals cases as undermined by this Court's opinion in *Alexander* v. *Gardner Denver Co.*, 415 U.S. 36 (Pet. App. 26a).[9]

Following the District Court's dismissal of the suit against the Company, Ms Guy and the Union jointly moved to have the Union realigned as a party plaintiff for purposes of appeal (App. 31a-32a). The Union noted it had "endeavored to protect all unit employees whom [it represents] from discrimination because of race" and that it was "interested to see that its members' rights to use their contractual grievance procedure [are] maintained and protected" (App. 35a, 38a). This motion was granted (App. 39a), and the district court's decision was appealed.

C. *The Court of Appeals Opinion*

On October 24, 1975, the Court of Appeals affirmed the

[9] The District Court recognized that Title VII had been amended on March 24, 1972 to extend the time limitation upon filing a Title VII charge to 180 days. (Pet. App. 20a; see note 7, p. 6, *supra*.) Ms. Guy's discharge occurred 150 days prior to the effective date of the 1972 amendment; and her charge was before the EEOC on the effective date. The District Court, however, regarded the amendment as inapplicable. (Pet. App. 20a.)

dismissal of the suit (Pet. App. 9a). The Court held, first, that pendency of the grievance procedure could not affect the 90-day time limit under § 706(d). Although *Alexander* v. *Gardner-Denver Co., supra,* had not addressed any time limitation question, it viewed that case as holding that the 90-day limitation must be construed strictly and without exceptions (Pet. App. 5a). Further, the Court reasoned that since Title VII "creates a right and liability which did not exist at common law and prescribes the remedy [,] [t]he remedy is an integral part of the right and its requirements must be strictly followed," citing *The Harrisburg,* 119 U.S. 199, 214 (Pet. App. 4a-5a). Thus, the Court held that it was powerless to adjust the statutory period even if such adjustment would effectuate Title VII's underlying policies. The Court also thought that *Alexander, supra,* and *Johnson* v. *REA, Inc.,* 421 U.S. 454, because they emphasized the independence of Title VII from other legal routes to relief from employment discrimination, counseled against tolling Title VII time limitations to permit the effective pursuit of grievance procedures (Pet. App. 4a).[10]

The Court of Appeals also addressed the question of the effect of the 1972 amendments, a question raised in that court by the EEOC appearing as amicus curiae.[11] The Court (Judges Weick and Peck) held that the 1972 amendments extending the time to file EEOC charges to 180 days, effective March 24, 1972, do not apply to this case, since "Guy's claim was barred on January 24, 1972" and "[t]he subse-

[10] The Court found *Culpepper, Hutchings, Malone,* and *Moore,* unpersuasive because they were decided before *Alexander,* and *Sanchez* unpersuasive because it relied on these four pre-*Alexander* cases.

quent increase of time . . . could not revive plaintiff's claim" (Pet. App. 8a-9a). Judge Edwards, dissenting on this point, noted that the Ninth Circuit, in *Davis* v. *Valley Distributing Co.,* 522 F.2d 827 (9th Cir. 1975), had recently held that "the extended limitations period [applies] to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period." (522 F.2d, at 830; Pet. App. 10a). Judge Edwards would have remanded to the District Court to consider the *Davis* rationale and its applicability to the present case (Pet. App. 12a).

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below has held that an employee forfeits his right to the protection of Title VII if he pursues a grievance under a collective bargaining agreement for more than 90 days [12] without filing an EEOC charge. All other courts of appeals to consider the question—the Fifth, Seventh, Ninth, and Tenth Circuits — have held to the contrary.[13] These circuits have concluded that the time for filing an EEOC charge is tolled during the period that such a grievance is being pursued.

[11] The Court of Appeals believed it was not compelled to address this argument since it had not been raised below. (Pet. App. 8a.) Nonetheless, it did reach the issue and decide it. (Although the effect of the 1972 amendment was not expressly discussed by the parties in the District Court, that Court was aware of the amendment but decided it was inapplicable to this case. See note 9, *supra.*) In this circumstance, the issue is properly before this Court.

[12] The 1972 amendments extended the filing period to 180 days. The holding of the court below would be equally applicable to post-1972 cases, where grievance pursuit exceeds 180 days.

[13] See cases cited *supra,* note 8.

We agree with the *result* reached by these circuits, but for a more basic reason. The limitations period established by § 706(e) (§ 706(d) prior to the 1972 amendments)[14] runs from the date "the alleged unlawful employment practice occurred." Tolling is required only where a time limit otherwise would expire; here, as we show in Part I, the time limit does not begin to run until the grievance-arbitration process is completed.

In a case like the instant one, analysis of the question when an alleged unlawful employment practice "occurs" requires an understanding of the "system of industrial self-government"[15] — the grievance-arbitration process — through which the final personnel determination is made. Under a collective bargaining agreement such as is applicable here, though management reserves the right unilaterally to take a personnel action in the first instance—such initial action of course constitutes an "occurrence" within the meaning of § 706(e)—it cedes its power to make a final personnel decision to the processes of the grievance-arbitration system. When an employee chooses to invoke those processes—as is his contractual right notwithstanding the employer's initial action—the final "management" action will be determined by the system.

The proposition that the completion of the grievance-arbitration process is an "occurrence" for the purposes of

[14] Prior to the 1972 amendments, the time limit appeared in § 706(d) of the Act. The 1972 amendments, in addition to enlarging the time limit, relettered the paragraphs of § 706 so that the time limit now appears in § 706(e). We use § 706(e) to refer to the time limit both before and after the 1972 amendments.

[15] *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580 (1960).

§ 706(e) not only accords with industrial reality, it is the only reading of Title VII that furthers the Act's primary objective: to stimulate voluntary, private implementation of the federal policy against employment discrimination—to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). As this Court recognized in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 55 (1974), the grievance-arbitration process is a vital instrument by which employers and unions can accomplish the self-evaluation and self-correction mandated by Title VII. When the employee retains confidence in the private system, requiring the filing of an EEOC charge before the grievance-arbitration procedure has concluded would inject the federal government into the process at a time when the private mechanisms might yet prove sufficient to solve the problem. Moreover, that reading of § 706(e) would, contrary to Congress' preference, produce "more litigation, not less," *Alexander, supra*, 415 U.S. at 59. Permitting the grievance-arbitration process full play (so long, of course, as the employee elects to withhold his EEOC charge to allow the private process to work) inevitably will reduce the burden imposed upon the EEOC and the courts.

Only if the Court rules, contrary to our contention, that the completion of the grievance-arbitration process is not a separate "occurrence" within the meaning of § 706(e), does it become necessary to consider the need for tolling. In that event, as we show in Part II, the rule adopted by the other Circuits, in conflict with the holding below, is a proper

application of traditional principles governing equitable adjustments of statutes of limitations and furthers the primary goal of Title VII to foster private, voluntary implementation of the federal policy against employment discrimination. Not to allow for tolling here would be to encourage premature governmental intrusion into and interference with private sector mechanisms designed to resolve employment disputes, and would needlessly burden the already backlogged EEOC and courts.

In Part III we show that, in any event, even if the only "occurrence" is the initial management determination, and even if the statutory period is not tolled during resort to the grievance-arbitration process, the charge here was timely filed with the EEOC. The 1972 Amendments to Title VII extended the limitations period of § 706(e) from 90 to 180 days. This case belongs in that limited category of cases in which charges were filed with the EEOC when more than 90 days had passed from the initial discharge determination but were pending with the EEOC when the 1972 Amendments went into effect less than 180 days after the initial discharge determination was made. Section 14 of the 1972 Act, declaring the § 706 amendments "applicable with respect to charges pending with the Commission on the date of enactment of this Act," renders the charge here timely even if it were not otherwise so.

ARGUMENT

I.

WHEN A DISCHARGED EMPLOYEE ELECTS TO PURSUE HIS CONTRACTUAL RIGHTS UNDER THE GRIEVANCE-ARBITRATION PROCEDURES OF A COLLECTIVE BARGAINING AGREEMENT, AND TO DE-

FER INVOCATION OF HIS STATUTORY RIGHTS UNDER TITLE VII UNTIL HE LEARNS THE OUTCOME OF HIS CONTRACTUAL QUEST, THE TIME LIMIT FOR FILING AN EEOC CHARGE DOES NOT BEGIN TO RUN UNTIL THE COMPLETION OF THE GRIEVANCE-ARBITRATION PROCEDURES.

An employee who is fired suffers an immediate injury—the loss of work and the loss of the present enjoyment of the wages paid for that work. Thus, if he believes the discharge was discriminatorily motivated, he may immediately file an EEOC charge. Title VII permits such an employee to file a charge upon the occurrence of an alleged unlawful employment practice. See § 706(e). This is so even if the employee is covered by a collective bargaining agreement containing a grievance-arbitration procedure: his *statutory* right to reinstatement is separate from whatever *contractual* rights he may have, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 50, 52 (1974), and he cannot be *required* to exhaust his contractual remedies as a precondition to invoking protection of his statutory rights. *Id.* at 59.

Often, however, as here, the employee will *prefer* to pursue his contractual rights first, and to turn to the EEOC for assistance only if his contractual remedies prove unavailing. (As we show *infra*, pp. 31-35, there are valid reasons why an employee may prefer this course). The principal question presented in this case is whether, if a discharged employee elects this course, the statutory time limit runs from the date of discharge (as the court below held) or, as we contend, from the date that the grievance-arbitration process is concluded (either by running its course, or because the employee has exercised his right to opt out of the system and resort to the EEOC).

Under the latter rule, an employee would not forfeit his right to go to the EEOC by first pursuing his contractual remedies. This rule is consistent with the statutory language and this Court's precedents, follows from an understanding of the "system of industrial self-government" erected by a collective bargaining agreement, *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 580 (1960), and is necessary to effectuate the "primary objective" of Title VII, private self-correction.

The limitations period established by § 706(e) runs from the date "the alleged unlawful employment practice occurred." A "discharged" employee suffers an immediate loss that is an "occurrence" which entitles him, if he wishes, immediately to invoke the processes of the EEOC. But under the system erected by the parties, that discharge does not mark the termination of the employee's contractual ties to his job. The parties have provided a machinery by which the decision to discharge will be reconsidered by successively higher-ranking management officials, and ultimately by an arbitrator. Only at the conclusion of that process does the employee learn whether his contractual tie to his job will be severed. If the process ends unfavorably to him, he then suffers the severance of his contractual relationship, which, like the earlier "discharge," is an "occurrence" for purposes of § 706(e).

In a plant where there is no contractually established grievance-arbitration process, an employer's declaration that an employee is discharged is in all respects a final occurrence. It not only deprives the employee of immediate work opportunities and wage payments, but also marks the end of whatever individual "contractual" tie the the em-

ployee had to his job. If such an employee believes the discharge was discriminatorily motivated, the time for filing an EEOC charge perforce runs from the date of discharge, and only from that date.

But even in such a plant, the considerations would be different if an employee were told by his supervisor: "I am suspending you from work immediately, and I am recommending to my superiors that you be fired. You will be notified when they have acted upon my recommendation." In that event, the suspension is an immediate "occurrence" which the employee could challenge under Title VII. But a later decision by higher management officials that the employee is discharged would be a separate "occurrence," for unlike the earlier decision it would mark the permanent severance of the employee's tie to his job.

Properly understood, a "discharge" in a plant where there *is* a collective bargaining agreement containing a grievance-arbitration procedure is like the suspension in a plant where there is no such procedure. However final-sounding the label "discharge," the parties have erected a system of industrial self-government under which the decision is *not* final.

Under that system, the *initial* decision to discharge an employee is made by someone in management and that initial decision triggers the immediate removal of the employee from his work-place, but the *final* decision is made later and under carefully prescribed standards and procedures. The agreement provides, substantively, that management may discharge employees only under specified conditions, typically (as here) only if there is "just cause"

for discharge and if the decision is not discriminatorily motivated. And it provides, procedurally, that the decision will be reconsidered at several steps.

The grievance procedure entitles the "discharged" employee to reconsideration of the decision by successively higher-ranking management officials. And if the decision remains unchanged through the grievance steps, there is ultimate resort to an arbitrator, who is, in effect, the ultimate "management" official, and who will make the final decision whether the discharge is justified. He has been chosen "because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment." *Gateway Coal Co.* v. *Mine Workers,* 414 U.S. 368, 378 (1974), quoting *Warrior & Gulf, supra,* 363 U.S. at 582. His role is "to bring his informed judgment to bear in order to reach *a fair solution of the problem.*" *United Steelworkers* v. *Enterprise Corp.,* 363 U.S. 593, 597 (1960) (emphasis added).

In carrying out this responsibility,

> "arbitrators have developed through the years certain norms to guide them in the determination of just cause. J. Fred Holly, in an analysis of over one thousand discharge cases, found the following to be among the more prominent of such standards.
>
> 1. Work rules must be known to the employee, and they must be reasonable.
>
> 2. There must be substantial proof of the rule violation, and the burden of this proof rests on the employer.
>
> 3. Administration of the rules must be consistent. Individual employees may not be singled out for discipline, and past practice may be a controlling consideration.
>
> 4. Where employees are held to particular standards, those standards must be reasonable.
>
> 5. Employers must not be arbitrary, discriminatory, or capricious in the administration of discipline.
>
> 6. The existence of mitigating circumstances such as seniority, prior work record, provocation in insubordination and altercation cases may require reduction of penalty."[16]

The "almost universal" rule is that management has the burden of proving to the arbitrator the existence of just cause for imposing discipline. *National Lawyers Club, Inc.,* 52 LA 547, 551 (Seidenberg, 1969); see generally, cases digested in BNA Labor Arbitration Cumulative Digest and Index, § 118.315. This rule reflects the understanding of the industrial relations community that the employer "has agreed to share his authority and no longer has sole and unilateral control over . . . disciplinary sanctions for employee violations of the provisions of the collective agreement"; instead, "if the employer is to prevail in contested matters involving discipline, it must be prepared to convince the Union [or ultimately the arbitrator] that its disciplinary action was founded on just or good cause." *National Lawyers, supra,* 52 LA at 551.

Thus, the processing of a grievance to arbitration is not

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[16] McDermott and Newhams, *Discharge-Reinstatement: What Happens Thereafter,* 24 Ind. & Lab. Rel. Rev. 526, 527 (1971), citing Holly, *"The Arbitration of Discharge Cases: A Case Study,"* Critical Issues in Labor Arbitration, Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators (Washington, D.C.: Bureau of National Affairs, 1957), pp. 5-8.

an "appeal" of management's decision. It is, rather, the means by which those officials who wish to discharge an employee are called upon to persuade the ultimate decision-maker—the "proctor" of the system of industrial self-government, *Alexander, supra,* 415 U.S. at 42—that such action is appropriate. If the proponents of discharge cannot meet that burden—if they cannot convince the arbitrator that there is just cause for discharge under the established rules —the employee returns to the job and is made whole for his interim losses.[17]

In sum, an initial declaration that an employee is "discharged" is not, under the "system of industrial self-government" present here, by its own force a final determination. The employee retains his tie to the work-place unless and until the grievance-arbitration procedure has been concluded unfavorably to him. Only then can he assess whether the *final* resolution is one which violates his rights under Title VII and thus warrants resort to the statutory procedures.

Construing § 706(e) in accord with the realities of the grievance-arbitration process conforms the administration

[17] Moreover, among the arbitrator's powers, under most contracts, is the power to modify the penalty—to reduce a discharge to a lesser sanction (e.g., suspension for a limited period), even where employee culpability is clear. See, e.g., *Lynchburg Foundry Co.* v. *United Steelworkers,* 404 F.2d 259 (4th Cir. 1968). This power is widely exercised. See generally cases digested in BNA, Labor Arbitration Cumulative Digest and Index, § 118.03; McDermott and Newhams, *supra,* 24 Ind. & Lab. Rel. Rev. at 527, 529. Its availability impels the parties, in the steps of the grievance procedure, to consider "settling" the grievance of even a clearly culpable employee by converting the discharge to a lesser penalty.

of Title VII to its "primary objective"—the "prophylactic one" of stimulating voluntary, private implementation of the federal policy against employment discrimination—causing "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, as far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-418 (1975). For only this construction begins the running of the statutory time limit at the conclusion of the parties' efforts at private compliance.

The grievance-arbitration process is a vital instrument by which employers and unions can accomplish the self-evaluation and self-correction mandated by Title VII. As this Court recognized in *Alexander, supra,* 415 U.S. at 55:

"[T]he grievance-arbitration machinery of the collective bargaining agreement remains a relatively inexpensive and expeditious means of resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective bargaining agreement contains a non-discrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum."

See also *Emporium Capwell Co.* v. *Western Addition Community Org.*, 420 U.S. 50, 66-67 (1975).

Responsive to Title VII's commands, unions and employers in growing numbers have incorporated prohibitions against employment discrimination into their collective bargaining agreements. Today, nearly three-fourths of all collective bargaining agreements have non-discrimination clauses paralleling Title VII's strictures, compared to only 28% in 1965 and 46% in 1970.[18] These clauses assure that discrimination claims are susceptible to resolution through the grievance-arbitration processes. A number of unions—the IUE prominent among them—have undertaken aggressive programs to cure discriminatory practices through grievance-arbitration, a phenomenon which has been recognized and applauded by EEOC representatives. Hammerman and Rogoff, *The Union Role in Title VII Enforcement*, 7 Civil Rights Digest No. 3, 22, 27-28, 30-33 (1975).[19] Arbi-

[18] Bureau of National Affairs, 2 Collective Bargaining Negotiations and Contracts, 95:5 (1975) (based on a representative sample of 400 contracts, see *id.*, at 32:21).

[19] The authors, special assistants to the EEOC's Director of Compliance, describe (*id.* at 27-28) the IUE's model contract provisions designed to strengthen the amenability of the grievance-arbitration process to discrimination claims, undertaken in response to this Court's enumeration in *Alexander* of "the main weaknesses of the arbitral forum in relation to Title VII grievances," and further describe the IUE's expansive program for eradicating employment discrimination throughout those segments of the economy whose members it represents, *id.* at 30-32.

The IUE's program of using grievance-arbitration procedures to remedy violations of Title VII was put in evidence, and findings with respect to its purpose and effect were made, in the decision of Administrative Law Judge Marvin Roth in Westinghouse Electric

trators have over the years regularly been presented with grievances alleging discrimination because of race or sex and have awarded relief where they found the grievances well founded.[20]

Moreover, a grievance need not allege violation of a non-discrimination clause in order to trigger a proceeding that furthers the objectives of Title VII. Even under an agreement which did not contain such a clause, an employee who

Corp., NLRB Case No. 6-CA-7680, JD-86-76 (February 17, 1976), pp. 8-9, 11, 21-22, 24-27.

Where the IUE has been unsuccessful in securing correction of discrimination under the grievance-arbitration machinery, IUE files charges with EEOC and law suits under the Equal Pay Act and Title VII. See for example: *General Electric Co.* v. *Gilbert*, now pending in this Court, Nos. 74-1589 and 74-1590; *Rinehart* v. *Westinghouse Electric Corp.*, 3 FEP Cases 851 (1971); *IUE* v. *Westinghouse*, USDCND WVa Civ. Act. No. C-75-62-F; *Biablocki and IUE* v. *Westinghouse*, USDCWD NY Civ. No. 75-467; *Nutter* v. *Westinghouse*, USDCSD Oh. ED No. C-2-75-602; *Austerman* v. *Westinghouse*, USDCWD Pa. Civil Action No. 75-229; *IUE and Moore* v. *Westinghouse*, USDCD NJ Civ. No. 75-1871; *Eberts and IUE* v. *Westinghouse*, USDCD NJ Civil Action No. 75-1879; *IUE* v. *Westinghouse*, USDCD NJ No. 75-1870; *IUE and Adams* v. *Westinghouse*, USDCWD Pa. Civ. Act. No. 74-570.

[20] See, e.g., the following decisions which are representative: *Swift & Co.*, 17 LA 537 (Ralph T. Seward, 1951), awarding the same prehire seniority remedy as was approved by this Court in *Franks* v. *Bowman Transportation Co.*, 44 U.S.L.W. 4356 (1976); *American Potash & Chemical Corp.*, 3 LA 92 (John A. Lapp, 1942), Mexicans demoted from leadmen positions when employees refused to work under them awarded right to first opportunity for next openings for leadmen; *Bethlehem Steel Co.*, 2 LA 187, 189-191 (Paul A. Dodd, 1945), reinstatement and back pay awarded black discharged due to racial prejudice of plant guard; *Tennessee Products & Chemical Corp.*, 20 LA 180 (W. H. F. Millar, 1953), back pay awarded where nondiscrimination clause violated by promoting

believed he had been discharged because of his race could file a grievance alleging that the discharge was without "just cause," and would secure reinstatement if the management officials initiating the discharge were unable to meet their burden of proving the existence of just cause for the discharge. In that event, Title VII's goal of equal employment opportunity would be achieved.

Congress' preference for private self-correction thus dictates construing the conclusion of the private effort as the starting point for the § 706(e) time limit. That construction is also necessary if the mechanisms established by Congress to handle cases not privately resolved are to be able properly to perform their functions, for if the EEOC and the courts are burdened with *unnecessary* cases, their ability to

four white employees instead of four black employees to leadmen jobs; *Tri-City Container Corp.*, 42 LA 1044 (Paul Pigors, 1964), where test discriminatory new nondiscriminatory testing awarded; *Albertson's Inc.*, 59 LA 1119 (Edmund D. Edelman, 1972); *Memphis Light, Gas & Water Div.*, 59 LA 1040 (Ralph Roger Williams, 1972); *Northrup Corp.*, 65 LA 400 (Syd N. Rose, 1975); *Lianco Containers Corp.*, 73-1 ARB ¶ 8144 (Paul C. Dugan, Arbitrator); *McCall Corp.*, 67-2 ARB ¶ 8498 (Robert G. McIntosh, Arbitrator); *Newspaper Guild of New York*, 63 LA 1064 (Maurice C. Benewitz, Arbitrator, 1974); *United States Postal Service*, 60 LA 206 (G. Allan Dash, Jr., Arbitrator, 1973); *Rex Chainbelt, Inc.*, 56 LA 224 (Samuel Edes, Arbitrator, 1971); *Reynolds Metals Co.*, 55 LA 1168 (Howard S. Block, 1970).

Sex: *Buco Products, Inc.*, 66-3 ARB ¶ 9014 (E. J. Forsythe); *Comstock Park Public Schools*, 57 LA 279 (Alan Walt, 1971); *Glass Containers Corp.*, 71-2 ARB ¶ 8615 (Harry J. Dworkin, Arbitrator); *Simoniz Co.*, 70-1 ARB ¶ 8024 (Robert G. Howlett, Arbitrator); *W. M. Chace Co.*, 48 LA 231 (Erwin Ellmann, Arbitrator, 1966); *Avco Corp.*, 70-1 ARB ¶ 8400 4314 (Burton B. Turkus, Arbitrator, 1970).

resolve cases which *require* their attention is undermined.

As *Alexander* recognized, the grievance-arbitration process may solve the problem without the need for federal involvement. The employee may secure full relief, or "a settlement satisfactory to both employer and employee," thus eliminating all need for resort to the statutory remedy. *Id.* at 51, n. 13, 55. Alternatively the evidence adduced may convince the employee that his perception of discrimination was groundless, and thus persuade him that resort to Title VII is unjustified. *Id.* at 55.

In either event, the private machinery will have resolved the problem without the need to add yet another charge to the staggering backlog under which the EEOC labors—106,700 unresolved charges as of June, 1975, with the number growing every day[21]—and thus leave the agency free to pursue those charges which could *not* be resolved pri-

[21] Report by EEOC Chairman Lowell Perry to Senate Labor Committee on Commission's Current Status and Projected Improvements, reprinted as a special supplement to BNA, Fair Employment Practices, Summary of Latest Developments, Oct. 30, 1975 at 12. In the preceding year—the EEOC's "most successful year to date"—the EEOC had successfully conciliated less than 7,000 charges. (*Id.*, at 2.) The Chairman predicted that the backlog would grow to 127,000 by June 1976. The backlog has increased substantially each year, in part because the total number of charges filed has increased astronomically in each year of the Commission's existence, e.g. 10,000 charges filed in FY 1968 compared to 71,000 in FY 1975 and an estimated 112,000 in FY 1976.

The delays occasioned by such a backlog are only hinted at in this case. The charge, filed in February 1972, resulted in an EEOC determination in November 1973, twenty-one months later. Because the EEOC found no probable cause, no conciliation efforts were necessary; otherwise, considerably more time would have elapsed. For example, in *EEOC* v. *Occidental Life Ins. Co.*, ... F.2d .....,

vately and thus *necessitate* its attention. In like fashion, private resolution will spare the courts the additional burdens of unnecessary lawsuits.

EEOC representatives have recognized that the EEOC and the courts cannot do the job unassisted, and that the successful resolution of discrimination claims through grievance-arbitration is vital to the federal policy against employment discrimination. Hammerman and Rogoff, *supra*, at 28:

> "Experience has demonstrated that, in most instances, government is not a practical forum for convenient, inexpensive, and expeditious resolution of charges of discrimination. The time lag is too long, the procedural steps too many, and successful resolutions without resort to the courts too few.
>
> To the extent the grievance procedure is credible and effective in handling complaints of discrimination, it should achieve the following results:
>
> 1) Institutionalize in union contracts the principles and methods of equal employment opportunity, and thereby reduce resort to government procedures in handling of grievances.
>
> 2) Reduce the number of charges filed with the EEOC and its referral agencies.
>
> 3) Minimize government interference in labor-management operations.
>
> • • •
>
> 5) Minimize resort to the Federal courts."

12 FEP Cases 1300 (9th Cir. 1976), the charge was filed in December 1970, the EEOC's investigation ended in February 1972, a reasonable cause determination was made in February 1973, and suit was filed, after one conciliation meeting with the respondent, in February 1974. See also cases cited infra, p. 38, n. 31, where suits were filed three to five years after charges had been filed, conciliation not even then having been concluded.

Even where grievance-arbitration processes do not result in a resolution eliminating the need for resort to Title VII, they may materially facilitate the ultimate processing of the Title VII charge. The record made, and the arbitrator's "knowledge of the common law of the shop," *Warrior & Gulf, supra*, 363 U.S. at 582, may illuminate the issues and justify consideration—in some circumstances the according of "great weight"—to the arbitrator's decision in the Title VII proceedings, *Alexander, supra*, 415 U.S. at 60, n. 21.[22] This additional light on the situation may permit a speedier and more informed resolution of the issues raised, with less burden upon the EEOC and the courts. And if grievance-arbitration produces even a partial remedy for the employee, it will lessen the injury he suffers as he travels the lengthy Title VII road, while at the same time possibly reducing the scope of the remaining issues to be litigated. Cf. *id.* at 51, n. 13.

In sum, requiring the filing of an EEOC charge before the grievance-arbitration procedure has concluded would inject the federal government into the process at a time when the private mechanisms might yet prove sufficient to solve the problem. So long as the employee retains confidence in the private system, and elects to withhold the filing of an EEOC charge, the congressional objective would be undermined by requiring premature resort to the EEOC. Such unnecessary governmental displacement of private dispute settlement mechanisms would "adversely affect

[22] See *Chandler* v. *Roudebush*, 44 U.S.L.W. 4709 (1976). See generally Edwards, Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representation, 27 Lab. L.J. 265 (1976).

* * * the enforcement scheme of Title VII" by producing "more litigation, not less." *Alexander, supra,* 415 U.S. at 59. Permitting the grievance-arbitration process full play (so long, of course, as the employee elects to withhold his EEOC charge to allow the private process to work) inevitably will reduce the burden imposed upon the EEOC and the courts.

In *Alexander,* the Court noted that, 415 U.S. at 49,

> ". . . Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he *first* pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." (Emphasis added.)

As the Court there held, Congress vested in the affected employee the decision whether to invoke the formal processes of Title VII by filing an EEOC charge. *Alexander, supra,* 415 U.S. at 45. He may do so immediately, without resort to, or awaiting the outcome of, the private mechanisms established in the collective-bargaining agreement. *Id.* at 59. But we submit that the "strong suggestion" of Title VII referred to in *Alexander* requires that when the employee has confidence in those mechanisms, and prefers to use them first, his time for filing an EEOC charge should not begin to run until the process has been completed. No other construction of the limitations provisions of Title VII meets the holding of this Court that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." *Alexander, supra,* 415 U.S. at 59-60.

II.

IF THE § 706(e) TIME LIMIT DOES NOT BEGIN TO RUN FROM THE CONCLUSION OF THE GRIEVANCE-ARBITRATION PROCESS, THEN TRADITIONAL EQUITABLE PRINCIPLES MANDATE TOLLING OF THE TIME LIMIT DURING THE PENDENCY OF GRIEVANCE-ARBITRATION PROCEEDINGS.

If, contrary to our argument in Part I, this Court were to conclude that the final decision emanating from the grievance-arbitration process is not an "occurrence," and thus that the time limit of § 706(e) begins to run from management's initial announcement that an employee is "discharged," it would then become necessary to consider whether the time limit is tolled by the pendency of grievance-arbitration proceedings. In that event it is our position that, as all courts of appeals but the court below have held, the time limit *is* tolled.

The issue whether traditional principles governing equitable adjustment of statutes of limitations mandate "tolling" of the § 706(e) time limits during the pendency of grievance-arbitration proceedings resolves itself into two questions. First, is the § 706(e) period subject to the implication of equitable adjustments, as are statutes of limitations ordinarily? Second, if so, does tolling in the circumstances presented "effectuate the basic congressional purposes in enacting this humane and remedial Act, as well as those policies embodied in the Act's limitation provision?" ***Burnett*** **v.** ***New York Cent. R. Co.,*** **380 U.S. 424, 427-28 (1965).**

A

On the first question, the view of the court below, that because "[t]he Act creates a right and liability which did not exist at common law and prescribes the remedy [, t]he remedy is an integral part of the right and its requirements must be strictly followed" (Pet. App. 5a), is clearly in error. This view that there is a "distinction between a statute of limitation and a limitation contained in a statute creating liability and imposing a remedy" (Pet. App. 6a), if it was ever the law, has been soundly rejected by this Court. For

> "(w)hile the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." *Burnett, supra,* 380 U.S. at 427 n. 2.

Therefore,

> the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe and Const. Co.* v. *Utah,* 414 U.S. 538, 559 (1974).[23]

[23] Indeed, petitioner in *American Pipe* relied upon the very passage from *The Harrisburg,* 119 U.S. 199, quoted by the court of appeals in support of its holding that § 706(e) is inflexible (Pet. App. 6a), but the Court in *American Pipe* distinguished that passage as applying only to the situation in which both the right and the statute of limitations sought to be relied upon in federal court were state-created. 414 U.S. at 557; see also *Burnett* v. *New York Central R. R. Co.,* 380 U.S. 424.

The Court of Appeals apparently viewed *Johnson* v. *REA Express,* 421 U.S. 454, as supporting its view that the time limits in § 706(e) must be literally applied. *Johnson* held that the statute of limitations applicable in 42 U.S.C. § 1981 cases, adopted from state law, is not to be tolled while an EEOC charge is pending. While the court below believed it would be anomalous to treat a federal limitations period with regard to a federal right more liberally than an adopted state limitations period, this Court in *Johnson* regarded the derivative nature of the limitations period in that case as indicating a *stricter* approach than in cases such as *Burnett* and *American Pipe,* where "the respective periods of limitation in those cases were derived directly from federal statutes rather than by reference to state law." *Johnson, supra,* 421 U.S. at 466. Moreover, in *Johnson* this Court noted that even with regard to a state limitations period, tolling would be appropriate "where [strict] application would be inconsistent with the federal policy underlying the cause of action under consideration." *Id.,* at 465.[24]

B

Thus, the § 706(e) period is, like an ordinary statute of limitations, subject to equitable adjustment when the "policy of repose, designed to protect defendants," *Burnett, supra,* 380 U.S. at 428, is "outweighed [because] the

[24] The court below pointed to a passage in *Alexander* requiring "timely" filing of an EEOC charge as necessitating its decision (Pet. App. 5a). Obviously, the *Alexander* court did not purport to determine what constitutes "timely" filing.

interests of justice require vindication of the plaintiff's rights." *Id.* To make this determination, "we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Id.*

We have already shown that to require the filing of an EEOC charge which the employee would prefer to hold in abeyance pending final resolution of his contractual claim flies in the face of two basic statutory policies: that requirement would inject the federal government into the dispute settlement process while all parties—including the affected employee—prefer to attempt a private resolution[25]; and

[25] Title VII's policy favoring voluntary compliance through arbitration is, of course, fully congruent with the federal labor policy favoring arbitration of contractual disputes. "The federal policy favoring arbitration of labor disputes is firmly grounded in congressional command." *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 377 (1974). Section 203(d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173(d) provides:

> "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

Congress recognized that this policy could best be effectuated by deferring governmental intervention until resort to the private machinery had been concluded. Section 203(d) goes on to provide that the services of the Federal Mediation and Conciliation Service should be made available in "settlement of such grievance disputes only as a last resort and in exceptional cases." The policy of Section 203(d) can be effectuated "only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 566 (1960). See also *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 241 (1970); *Alexander, supra*, 415 U.S. at 59.

that requirement would compel the overburdened EEOC to undertake investigation and conciliation where neither may prove to be necessary, and thus divert its attention from those cases where agency action is essential. See pp. 22-24 *supra*.

But, it may be argued, while these points are indisputable, they can be accommodated simply by making the employee file his EEOC charge within 90 (now 180) days of the discharge even though the grievance-arbitration process, with which he is content at the critical moment, has not run its course. Such an argument overlooks both the policies of the statute and the practicalities of the situation:

1. The employee may have valid reasons for deferring the filing of an EEOC charge until he has completed his resort to the grievance-arbitration process. Once an employee files a charge with the EEOC, the charge can be withdrawn only "with the consent of the Commission." EEOC Regs. 29 C.F.R. § 1601.09. The EEOC may insist that the subject matter of the charge be resolved in the manner which *it* deems appropriate. And the EEOC's conception of an appropriate settlement may involve the addressing of problems far broader than those affecting the complaining employee. A black male's charge of mistreatment on the job, for example, may result in EEOC insistence upon a settlement addressed to the plight of white women whom the employer never hired. *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976), and cases cited therein. (See also cases discussed *infra*, pp. 36-37.) As a result, the pendency of the EEOC charge can inhibit the normal workings of the grievance-arbitration process in several ways.

(a) In *Alexander, supra*, 415 U.S. at 52 n. 15, the Court

presumed that an employee could settle his claim so long as his "consent to the settlement was voluntary and knowing" and so long as it did not entail a prospective waiver of Title VII rights. The employee may forfeit that opportunity to secure a favorable settlement of his grievance if required to file a charge prior to the completion of the grievance-arbitration process. The employer, who might otherwise be prepared to settle the grievance on terms desired by the employee, may be less willing to offer such a settlement when he knows that he will not thereby solve the "problem," i.e., when he knows that the charge pending with the EEOC may still be processed.

(b) The employer, mindful that his actions may ultimately be adjudicated pursuant to the EEOC charge, may be reluctant to engage in that frank interchange which is essential to a successful grievance-arbitration process,[26] and may be reluctant to make concessions looking toward settlement of the grievance lest they ultimately be used against him in the EEOC proceeding. This stiffening of the employer's position is wholly inconsistent with the voluntary, informal, flexible format which enables the grievance-arbitration process "to function as an efficient, inexpensive, and expeditious means for dispute resolution." *Alexander, supra,* 415 U.S. at 58.

(c) The employee may prefer to pursue the grievance-arbitration process exclusively, at least as a first resort, for other less tangible reasons. He may believe that his employer will more readily settle a grievance which is being processed "internally," i.e., through the procedural format

[26] See Elkouri and Elkouri, *How Arbitration Works* (BNA) 3d Ed. (1973), at 14-15, 110-111.

to which the employer has agreed, than when the employee has committed the "disloyal" act of bringing in the forces of the Federal Government. Likewise, the employee may believe that, even if he succeeds in securing his reinstatement, his future treatment will be more pleasant if he has not offended the employer by invoking the intervention of outside agencies.[27]

Moreover, as we have noted, it is entirely possible for an employee to process and win a grievance correcting discriminatory action taken by an employer without ever having to directly accuse the employer of being a discriminator. (For example, an employee can contest his discharge as "unjust," and secure reinstatement because the employer cannot meet its burden of proving "just cause."[28] In that event, race need never have been openly discussed in the process, yet a racially motivated discharge will have been cured as effectively as Title VII could have cured it.) The employee may believe that his prospects for securing a

[27] Employees reinstated after filing charges with the National Labor Relations Board have overwhelmingly encountered employer antagonism sufficiently strong to cause employees to quit. The only study of this subject of which we are aware showed that of 71 cases settled by the NLRB's New England regional office between July 1, 1962 and July 1, 1964, involving 194 discharged employees, of the 85 who actually went back to work, only 25 kept their jobs. "The other 60 who returned later left because of bad company treatment." Study by Leslie Aspin prepared as a Ph.D. dissertation, Summary of Findings of a Study of Reinstatement Under the National Labor Relations Act, printed Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor, House of Representatives, 90th Cong., 1st Sess., on H.R. 11725, pp. 3-12 (GPO, 1968).

[28] See *supra,* pp. 16-18.

favorable settlement from the employer are enhanced when he has not accused the employer of being a racist, and when the employer's acquiescence in reinstating him does not constitute an implicit admission of such a charge. He may further believe that the treatment he will receive following reinstatement will be better if he has not accused the employer of racial discrimination.

These considerations, while subjective and intangible, are nonetheless important, and may prompt employees to prefer completion of their contractual remedies before resorting to Title VII.

Of course, if an employee ultimately fails to secure reinstatement in the grievance-arbitration process, he may then wish to resort to the "plenary" powers of Title VII. *Alexander, supra,* 415 U.S. at 45. But it hardly follows that he should be forced to invoke the government's aid prematurely, when in his judgment his prospects for reinstatement are better served by keeping the dispute confined to the private machinery. If the compulsion for premature invocation of federal intervention sufficiently devalued the grievance-arbitration process that employees opted not to resort to it, "the possibility of voluntary compliance or settlement of Title VII claims would be reduced, *and the result could well be more litigation, not less.*" 415 U.S. at 59 (emphasis added).

2. There is yet another cost in requiring premature EEOC filings. Employees are generally familiar with the grievance-arbitration process,[29] and with the "rule" that they

[29] It has been estimated that ten to twenty grievances are filed each year under collective bargaining grievance procedures for each one hundred employees. S. Slichter, S. Healy, and E. Liverness, *The Impact of Collective Bargaining on Management* (1960). Thus, an employee working in a plant covered by such a procedure has a fair chance of having filed a grievance himself in the past year and is almost certain to be aware of others who have used the procedure. The grievance procedure, is "an integral part of the administration of the enterprise" when it is in effect. Feller, *A General Theory,* 61 Calif. L. Rev. at 755.

must exhaust their grievance procedure before resorting to outside remedies. *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650. It is inevitable that many employees will follow the normal course and will not consider resort to the EEOC until they have exhausted the grievance procedure. Thus, unless the time limit runs from the conclusion of the grievance-arbitration process, it is probable that many employees will forfeit their right to use Title VII.

We have shown that the policies of Title VII point strongly toward tolling the statutory time limit until the completion of the grievance-arbitration process. There remains the question of what costs would be incurred by tolling. In *theory,* it might be imagined that tolling would produce some measure of delay in final resolution, some harm to the policy favoring repose of disputes after a given time period has expired, and, in certain instances, a delay in notifying the respondent of the complaint against him, so that he can marshall witnesses and evidence promptly. Cf. *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.,* 321 U.S. 342, 348-349. In *practice,* given the current state of the EEOC backlog, the judicial interpretations divesting the EEOC charge of any notice-giving function, and the peculiar statutory structure which permits suit to be filed literally years after the charge is filed, there

is an air of complete unreality about concerns over notice and delay; indeed, tolling *increases* the employer's likelihood of receiving early notice of the charges against him.

First, filing an EEOC charge does not, although perhaps it should, result in notice to the respondent of the allegations upon which suit may later be filed. The courts have held that suit may be filed based on any claim uncovered in the EEOC investigation, even matters wholly outside the scope of the allegations contained in the charge. *EEOC* v. *General Electric Co.*, 532 F.2d 359 (4th Cir. 1976), and cases cited therein; *EEOC* v. *Occidental Life Ins. Co.*, ... F.2d ....., 12 FEP Cases 1300, 1305-07 (9th Cir. 1976). Thus a charge filed by incumbent black male employees, complaining only of the employer's treatment of them on the job, may give rise to a lawsuit seeking remedies for the employer's refusal to hire white females. *General Electric, supra.* And a charge filed by a woman, alleging sex discrimination because of her treatment during pregnancy and maternity, may result in a lawsuit alleging discrimination against men in the administration of a retirement system. *Occidental Life, supra.* See also *De Figueiredo* v. *TWA*, 322 F. Supp. 1384 (S.D.N.Y. 1971) (charge of discrimination against women filed by hostess resulted in suit by male flight purser alleging discrimination against males); *EEOC* v. *Raymond Metals Co.*, 530 F.2d 590, 596, 597 (4th Cir. 1976) (charge of national origin discrimination may result in suit for race and sex discrimination; *Patterson* v. *American Tobacco Co.*, ... F.2d ....., 12 FEP Cases 314, 324 (4th Cir. 1976) (charge of discrimination against men may give rise to suit for discrimination against women); *EEOC* v. *Louisville & Nashville R. R. Co.*, 505 F.2d 610, 612, 617 (5th Cir.

1974) (charge alleged racial discrimination in refusal to hire employee due to false statements in employment application; EEOC, finding no reasonable cause to sue over the charging employee's treatment, sued instead challenging the employer's consideration of arrest records and use of tests in making other hiring decisions).

Second, the filing of a charge with the EEOC does not necessarily mean that the employer will promptly learn of the charge's existence. Although the 1972 Amendments to Title VII require notice to the respondent of a charge within ten days of its filing, 42 U.S.C. § 2000e-5(b), this rule has not necessarily been complied with or enforced by the courts. See *EEOC* v. *Exchange Security Bank*, ... F.2d ....., 12 FEP Cases 1067 (5th Cir. 1976) (EEOC failed to serve notice of the charge upon the respondent for eighteen months). Cf. *EEOC* v. *South Carolina National Bank*, ... F.Supp. ....., 12 FEP Cases 843 (D.C.S.C. 1976). (improper notice of charge served fifteen months late; proper notice served three years late.)

Third, the statutory scheme imposes no time limit within which suit must be filed. Because of its backlog, the EEOC may take several years to process a charge through investigation, probable cause finding, and conciliation. Once 180 days have elapsed, the charging party can request a right-to-sue letter and proceed to court, EEOC Regs. § 1601.25(c), but he is not required to do so. Instead, if the statutory processes have not been concluded, he may wait as long as he wishes and then, whenever he is ready to sue, request the right-to-sue letter.[30] Even where the EEOC itself de-

[30] See, e.g., *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796-797 (1973) (suit filed three years after charge filed).

cides to institute suit, delays between charge filing and suit filing often consume three to five years.[31] And when suit *is* filed, legal proceedings may be interminable.[32]

In the real world, therefore, the slight delays occasioned by computing the time limit for filing EEOC charges from completion of the grievance-arbitration process rather than from the date of discharge impose no costs whatsoever upon statutory interests.[33] Indeed, the grievance-arbitration process is likely to accord the employer many of the protections which he is *not* furnished by the statutory machinery. Because of the need quickly to air grievances before they impede productivity, and because of the possi-

[31] See, e.g., *EEOC* v. *Cleveland Mills Co.*, 502 F.2d 153 (4th Cir. 1974), cert. denied 420 U.S. 946 (1975) (four and a half years); *EEOC* v. *Meyer Brothers Drug Co.*, 521 F.2d 1364 (8th Cir. 1975) (three years); *EEOC* v. *E. I. duPont de Nemours & Co.*, 516 F.2d 1297 (3rd Cir. 1975) (nearly three years); *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975) (three and a half years); *EEOC* v. *Louisville & Nashville R. R. Co.*, 505 F.2d 610 (5th Cir. 1974) (three years). Although the courts in the cited cases permitted the suits to proceed despite the lengthy delays, courts in three recent cases, declaring the delays "inexcusable," dismissed EEOC suits for laches. *EEOC* v. *South Carolina National Bank*, ... F.Supp. ....., 12 FEP Cases 843 (D.C. S.C. 1976) (four years); *EEOC* v. *Moore Group, Inc.*, ... F.Supp. ....., 12 FEP Cases 868 (N.D. Ga. 1976) (five years); *EEOC* v. *Metro Atlanta Girls' Club*, ... F.Supp. ....., 12 FEP Cases 871 (N.D. Ga. 1976) (three years).

[32] *Albermarle* reached this Court in its ninth year. 422 U.S. at 408.

[33] As against the time periods for EEOC charge processing discussed above, compare the statistics for arbitration. Federal Mediation and Conciliation Service, *Twenty-Seventh Annual Report, Fiscal Year 1974*, at 48; Davis and Pat, *Elapsed Time Patterns in Labor Grievance Arbitration:* 29 Arb. J. 15, 21 (1974).

bility of retroactive liability, grievance-arbitration procedures usually contain time limits both upon filing grievances and appeals and upon answers thereto much shorter than any public statute imposes.[34] And these strict time limits encourage the parties to speak to witnesses within days of any event grieved. These procedures thus are likely to provide respondent employers with a better opportunity to preserve evidence and witnesses for later litigation than if the employee opted to forego his contractual remedy and instead filed a Title VII charge immediately. In sum, while affirmance would dispense with this lawsuit, it would do much harm and no substantial good to the system of remedying employment discrimination charges.

The foregoing analysis demonstrates both that here there is a "significant underlying federal policy that would • • • [conflict] with a decision not to suspend the running of the statute," *Johnson, supra*, 421 U.S. at 466, and that the real costs to the defendant of tolling in this instance are miniscule. As *Alexander* recognized, Title VII embodies a preference for voluntary settlement and conciliation, and the grievance-arbitration process is often an effective means toward this end. See pp. 19-25, *supra*. A non-tolling rule could both impede use of the grievance-arbitration process

[34] Courts of Appeals have generally adopted a flexible approach to Title VII limitations periods even when they have denominated the periods as "jurisdictional." See, e.g., *Vigil* v. *American Telephone & Telegraph Co.*, 455 F.2d 1222 (10th Cir. 1972); *Anderson* v. *Methodist Evangelical Hospital*, 464 F.2d 723 (6th Cir. 1972); *Richard* v. *McDonnell Douglas Corp.*, 469 F.2d 1249 (8th Cir. 1972) (see also *Olson* v. *Rembrandt Printing Co.*, 511 F.2d 1228 (8th Cir. 1975); *Harris* v. *National Tea*, 454 F.2d 307 (7th Cir. 1971); *Harris* v. *Walgreen's*, 456 F.2d 588 (6th Cir. 1972). Cf. *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928-931 (5th Cir. 1975).

and, in some instances, result in forfeiture of Title VII rights by lay employees used to operating under the rules of the shop.

Nor would tolling the statute of limitations in this circumstance be in any way inconsistent with the holding in *Johnson, supra*. The issue in this case is not, as it was in *Johnson*, whether one statutory route for judicial relief regarding employment discrimination is to be adjusted by tolling to accommodate an entirely separate Congressional scheme for providing such relief. Rather, the question is whether the policies underlying Title VII *itself*, which prefer voluntary settlement without litigation, dictate tolling Title VII time limits to preserve the grievance-arbitration forum as an effective means to voluntary settlement.[35] While here, as in *Johnson*, the two remedies pursued are *legally* independent, here, unlike *Johnson*, it would be inconsistent with the very remedial scheme sought to be invoked to discourage or fail to accommodate resort to grievance-arbitration procedures. Thus, in *Johnson* there was "no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independ-

[35] Consistently with the concept that a collectively bargained grievance-arbitration process creates a different employee-employer relationship than would otherwise obtain, the courts which have recognized a rule tolling the time for filing a Title VII charge during the pendency of a grievance proceeding have uniformly, and in our view correctly, applied the rule only when a formal pre-determined set of procedures acceded to in advance by the employer was invoked, and not when the plaintiff claimed to have made ad hoc attempts, outside of any agreed-upon procedure, to discuss the claim. See, e.g., *Moore* v. *Sunbeam Corp., supra*, 459 F.2d at 827; *Dudley* v. *Textron, Inc.*, 386 F.Supp. 602 (E.D. Pa. 1975).

ently," 421 U.S. at 466; here, the policy reasons are substantial, so that the minimal potential harms to the respondent are "outweighed." *Burnett, supra*.[36]

III.

THE 1972 AMENDMENT TO TITLE VII EXTENDING THE TIME LIMIT FOR FILING AN EEOC CHARGE FROM 90 TO 180 DAYS APPLIES TO CHARGES PENDING WITH THE EEOC ON THE EFFECTIVE DATE OF THE AMENDMENT.

The issues discussed heretofore, concerning the accommodation of the § 706(d) time limit to grievance-arbitration procedures, are the more important, in the Union's view, of the questions involved in this case. The remaining question, involving the applicability of the expanded time limits created by the 1972 amendments to charges filed with the EEOC before the effective date of the amendments and not dismissed before that date, has pertinence only to a relatively small number of still active charges or court cases—those in which charges were filed with the EEOC prior to March 24, 1972 (the effective date of the 1972 amendments),

[36] Parenthetically, it should be noted that at least part of the rationale in *Johnson* was apparently that given the "frequently protracted period of EEOC consideration," 421 U.S. at 467-468 n. 14, the delay period resulting from tolling could be lengthy. Here, the character of EEOC procedures has the opposite import: because of the very problem *Johnson* noted, the additional harm to respondent from tolling is likely to be minimal. Similarly, the concern evidenced in *Johnson* for fair, timely notice to respondents, 421 U.S. at 467-468, is of less consequence here, since the notice obtained from an EEOC charge has neither had the specifity nor effect of the judicial complaint to which respondent in *Johnson* was entitled. See pp. 36-37, *supra*.

more than 90 days after the "occurrence" and were pending with the EEOC on March 24, 1972, less than 180 days after that occurrence. The first question presented, on the other hand, is of significance to EEOC charges filed both before and after the 1972 amendments, and will continue to have relevance to charges filed in the future.

Ms. Guy, however, is quite clearly entitled to reversal of the dismissal entered by the district court even if this Court determines that former § 706(d) must be read so as to calculate the running of the limitations period from the date of her discharge. For § 14 of the Equal Employment Opportunity Act of 1972 states that:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and to all changes filed thereafter" (Pet. App. p. 31a).

The provision expanding the charge filing period to 180 days amended § 706 of the 1964 Act,[37] so that § 14 in terms applies to that charge: Ms. Guy's discharge occurred 150 days before the effective date of the 1972 Act; on that effective date, her discharge had not been dismissed by the Commission. Thus, Ms. Guy's charge was, within the ordinary meaning of the language, "pending with the Commission on the date of the enactment of the Act." Further, had her charge been filed on March 24, 1972, or any of the thirty succeeding days, it would have been timely filed within the literal language of new § 706(e) and § 14 of the 1972 Act.[38] Since "t[o] require a second 'filing' by the aggrieved party

[37] See n. 7, *supra*.

[38] If there is any ambiguity at all in the word "pending"—that is, if there is any possibility that Congress meant "pending"

• • • would serve no purpose other than the creation of an additional procedural technicality," *Love* v. *Pullman Co.*, 404 U.S. 522, 527, the EEOC was entitled to "properly hold [the] complaint in 'suspended animation,' automatically filing it upon [the effective date of 1972 Amendments]." *Id.*

Yet, the majority on the court below, without noting § 14 of the 1972 Act at all or explaining why it is not to be applied in accordance with its plain language, and without citing any authority, maintained that "[p]laintiff Guy's claim was barred on January 24, 1972 [and] [t]he subsequent increase of time to file the charge enacted by Congress, could not revive plaintiff's claim which had been previously barred and extinguished" (Pet. App. 8-9a).

The notion that a legislature may not revive a time barred claim was long ago put to rest. *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 311, 314, stated:

> "In Campbell v. Holt, 115 U.S. 620, supra, this Court held that where lapse of time has not invested a party with title to real or personal property, • • • legislature • • • may repeal or extend a statute of limitations, even after right of action is barred thereby, [and] restore to the plaintiff his remedy [.] • • •
>
> • • •
>
> "Statutes of limitation find their justification in neces-

charges to encompass only those charges filed before March 24, 1972, still before the Commission, *and* timely when filed—the ambiguity is eliminated by the legislative history. For the intent was that § 14 covered "charges *filed with the Commission prior* to the effective date of the Act." Committee Leg. Hist. at 1851 (Section-by-Section analysis of Conference bill). *See also id.*, at 1777 (Section-by-Section analysis of Senate bill). Certainly, Ms. Guy's charge was "filed • • • prior to the effective date of the Act," whether or not it was timely when filed.

sity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of R. Telegraphers* v. *Railway Exp. Agency*, 321 U.S. 342. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control."

The fact that a limitations period is contained in the statute creating the right is no longer considered to render the limitations period necessarily inseparable from the right created. *American Pipe & Const. Co.* v. *Utah*, 414 U.S. 538, 556-59; *Burnett* v. *New York Cent. R. R.*, 380 U.S. 424, 426-27 & n. 2. The question is one of legislative purpose and intent. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U.S. 356, 360. Thus, to the extent that *William Danzer & Co.* v. *Gulf & Ship Island R. R.*, 268 U.S. 633, relied on some fundamental distinction in this regard between limitations periods contained in statutes creating new rights and other limitations statutes, it is no longer good law. Moreover,

"[a] close reading of *Chase Securities* indicates that

> the Supreme Court did not distinguish *Danzer* on the ground that the limitations provision was contained in the statute that created the substantive liability. Rather, the Court relied on the fact that, for the reasons suggested, Congress *had intended* the expiration of the limitation period to put an end to the existence of the liability itself, not to the remedy alone. 325 U.S. at 312 n. 8." *Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 833, n. 7 (9th Cir. 1975).

Of course, statutes of limitations, like other legislation, may not be applied retroactively if "doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711. But this case, like *Chase Securities, supra*, "is not a case where [respondent's] conduct would have been different if the present rule had been known and the change foreseen. It does not say, and could hardly say, that it [engaged in unlawful discrimination] depending on a statute of limitation for shelter from liability." 325 U.S. at 316. Nor is there any reason to believe that between January 24 and March 24, 1972, the evidence available for respondent's defense was eliminated in reliance upon he barring of the claim.[39]

The "statutory direction" appears, as noted, plainly not

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[39] Indeed, on January 24, 1972 and at the time the charge was filed on February 10, 1972, respondent had every reason to believe such a charge would be held timely. There was then Sixth Circuit law indicating that § 706(d) time limits could be tolled during the pendency of grievance proceedings. *Schiff* v. *Mead Corp.*, 2 FEP Cases 1089 (6th Cir. 1970). Moreover, Ms. Guy could have filed an action under 42 U.S.C. § 1981 with regard to her discharge at least until October 25, 1972 (Pet. App. 15a), and the same evidence and witnesses would have been pertinent.

only to permit but to direct that the 180 day time limit apply at least to all claims which could have been filed timely under the March 24, 1972 amendment on or after that date. This Court has recently noted and, seemingly, approved the holding in *Brown* v. *General Securities Administration*, 507 F.2d 1300 (C.A.2 1974) that the 1972 Act granting federal employees the right to sue under Title VII as a remedy for employment discrimination is to be applied to charges of discrimination filed before the amendments were passed, *Brown* v. *United States*, ... U.S. ....., 44 U.S.L.W. 4704, 4705 n. 4 (1976), Cf. *Place* v. *Winberger*, ... U.S. ....., 44 U.S.L.W. 3718 (granting rehearing, vacating denial of certiorari, and remanding for consideration in light of *Brown*). Yet, in *Brown* there was no express statutory command that the remedy for federal employees was to apply to pre-filed charged. If the 1972 amendments can create a right to sue in court where there was not necessarily such a right before those amendments at all (see *Brown*, 44 U.S.L.W., at 4706) without an explicit Congressional expression of intent in that regard, surely those same amendments must be held, where there is such an expression of intent, to merely extend in time a right to sue already grantd in 1964.

Finally, "[t]here is no substantial reason [in the legislative history] for giving less than their full meaning to the words of section 14." *Davis* v. *Valley Distributing Co.*, *supra*, 522 F.2d at 831.[40] True,

[40] There is no distinction between *Davis* and this case of any conceivable relevance. In both cases the charge was first filed with the EEOC more than 90 days after the occurrence complained of and before the effective date of the 1972 amendment. In both cases, the charge would have been timely within the literal language of § 14 if first "filed" after March 24, 1972.

In *Davis*, the EEOC charge, first filed on March 14, was referred to a state agency because the complainant had failed to exhaust his state remedies and was consequently not *considered* filed until after March 24. Here, all procedural prerequisites to EEOC consideration were complied with before the charge was filed on February 10, and referral was unnecessary. Surely, Ms. Guy cannot be prejudiced by the fact that she had not failed, as *Davis* had, to meet one of Title VII's procedural prerequisites.

> "Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable to pending claims. *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th Cir. 1975); *Koger* v. *Ball*, 497 F.2d 702, 708 (4th Cir. 1974). [See also 118 Cong. Rec. 4816 (1972).] But Congress did not limit section 14 of the 1972 Act to the new remedy, although it would have been simple to do so. The language of section 14 is sweeping. It includes all amendments to section 706. Congress was, of course, aware of the other amendments to section 706 contained in the same bill. The provision extending the limitation periods was called to Congress' attention by committee reports and in floor debate. [See 118 Cong. Rec. 7167, 7565 (1972); S. Rep. No. 415, 92 Cong., 1st Sess. 2, 36-37 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 27 (1971)]. In both the House and Senate, prior court decisions maximizing coverage within the given time limits were noted with approval, and the remedial purpose of extending the 90-day period to 180 days was emphasized." [See 118 Cong. Rec. 7166, 4941 (1972).] *Davis, supra*, 522 F.2d at 831 (footnotes omitted).

Since there is nothing in the legislative history to refute the "conclusion that Congress intended the extended limi-

tations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period," 522 F.2d at 830, § 14 must be read as written. Ms. Guy is therefore entitled to her day in court on this basis if not on the grounds discussed in Parts I and II, *supra*.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

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July 9, 1976

APPENDIX A

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are:

(1) Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 259 (July 2, 1964), which reads as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) Section 706(b) and (e) of the Civil Rights Act of 1964, as amended by § 4(a) of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 104 (March 24, 1972) (42 U.S.C. § 2000e-5(e)), which reads as follows:

> Sec. 706. • • •
>
> (b) • • • If the Commission determines after such investigation that there is reasonable cause to determine that the charge is true, the Commission shall endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation, and persuasion. • • •
>
> • • •
>
> (e) In the case of any charge filed by a member of

the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(3) Section 14 of the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, 113 (March 24, 1972), which reads as follows:

Sec. 14. The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

(4) Section 201 and 203(d) of the Labor Management Relations Act of 1947, 61 Stat. 152, 153 (June 23, 1947) (29 U.S.C. §§ 171 and 173(d)), which in pertinent part read as follows:

SEC. 201. That it is the policy of the United States that—

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interest of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees

through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

• • •

SEC. 203. • • •

• • •

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

APPENDIX B

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
46 North Third Street, Suite 1004
Memphis, Tennessee 38103

District Office

Case No.: YME4-155
Charge No.: TME2-0601

DORTHA A. GUY
60 West Davant
Memphis, Tennessee 38109

Charging Party

ROBBINS & MYERS, INC.
(Hunter Fan Division)
2500 Frisco Avenue
Memphis, Tennessee 38114

LOCAL 790, INTERNATIONAL
UNION OF ELECTRICAL, RADIO
& MACHINE WORKERS
(AFL-CIO)
2881 Lamar Avenue
Memphis, Tennessee 38114

Respondents

DETERMINATION

Under the authority vested in me by Section 1601.19b(d) of the Commission's Procedural Rules, 37 Fed. Reg. 20165 (September 27, 1972), I issue, on behalf of the Commission the following determination as to the merits of the subject charge.

Respondents are an employer and labor organization, respectively, within the meaning of Title VII and the timeliness and all other jurisdictional requirements have been met.

Charging Party, a Negro, states she was discharged while on sick leave, even though established procedures were

followed in obtaining leave. She alleges Respondent Employer discharged her and that Respondent Labor Organization failed to represent her because of her race.

Respondent Employer denies the charge and contends that Charging Party was discharged in accordance with the provisions of its collective bargaining agreement. Respondent Employer further contends that Charging Party had been on a number of sick leaves, was a union steward, and was well aware of the sick leave policy.

Article V, Section 14, (item f) of the collective bargaining agreement states that seniority shall be broken if the employee fails to return to work or fails to report to the personnel office and give a satisfactory reason for failure to return to work on the first scheduled work day following expiration of leave.

It is undispuated that Charging Party was scheduled to return to work on October 26, 1971. She did not return to work, but visited her doctor. Charging Party states she called Respondent Employer's answering service and left word that she was unable to report to work. Respondent Employer denies that it received such a call. Charging Party is unable to explain why she did not call during business hours and talk to personnel officials.

During the investigation, Charging Party stated that as union steward, she assisted two Blacks in getting reinstated under similar circumstances. She states one employee provided proof that he was hospitalized and was physically unable to report or call in. She does not recall the details of the other. The record shows that in January 1971 a Caucasian was discharged because she failed to report or call

upon expiration of leave. Due to efforts of union officials, this employee was reinstated 3 months later after providing a statement from her physician that she was emotionally upset and therefore unable to call.

Respondent Labor Organization denies Charging Party's failure to represent allegation. Union officials contend that even though Charging Party failed to provide evidence that she was unable to act on her behalf on the day in question, her grievance was processed to the third step where it was denied. The record supports Respondent Labor Organization's contentions. Evidence also shows that Respondent Labor Organization processed 5 other grievances on behalf of Charging Party during her employment.

Based on the above, the Commission finds no reason to believe that race was a factor in the decision to discharge Charging Party or that Respondent Labor Organization failed to represent her because of her race.[1]

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, she may do so by filing a private action in Federal District Court within 90 days of her receipt of this letter, and by taking the other procedural steps set out in the enclosed Notice of Right to Sue.

On behalf of the Commission:

CHARLES A. DIXON, *District Director*

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[1] Commission Decision 70-547, Employment Practices Guide (CCH) Para. 6123.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC.,
Respondent.

No. 75-1276

DORTHA ALLEN GUY,
Petitioner,

v.

ROBBINS & MYERS, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

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v.

ROBBINS & MYERS, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

Respondent, Robbins & Myers, Inc. (the Company), files this single brief in response to briefs of Petitioners, International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 (the Union) and Dortha Allen Guy, in Case Nos. 75-1264 and 75-1276 which have been consolidated for argument.

QUESTION PRESENTED

Whether the filing of a grievance pursuant to a grievance-arbitration clause of a collective bargaining agreement tolls the jurisdictional requirement of Title VII (42 U. S. C., Sec. 2000 e-5(d)) that all charges must be filed with the Equal Employment Opportunity Commission within ninety days from the date the alleged unlawful employment practice occurred.

STATEMENT OF THE CASE

Petitioner Guy was terminated by Respondent on October 25, 1971, for failing to report to work following an authorized sick leave. A grievance was filed on behalf of Guy by a co-worker on October 27, 1971, stating: "Protest unfair action of Co. for discharge. Ask that she be reinstated with compensation for lost time." (A. 18a)[1]

Guy learned of her termination of employment on October 29, 1971, when she returned to work. She processed her grievance through the third step of the grievance procedure, where the grievance was denied in writing on November 18, 1971. (A. 18a-19a)

On February 10, 1972, one hundred and eight (108) days from the date of discharge, Guy filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC or Commission) wherein she alleged that the Company unlawfully terminated her because of her race and that the Union had not fairly represented her because of her race. The EEOC advised Guy on November 20, 1973, that the Commission found no reason to believe that either the Company or Union had discriminated against her on the basis of race and provided Guy with a "Notice of Right to Sue".

[1] Reference is to the single Appendix.

On February 20, 1974, Guy sought a thirty-day extension within which to file a Complaint in the United States District Court for the Western District of Tennessee. The extension of time was granted, and Guy commenced her court action on March 19, 1974, against both the Company and Union alleging violations of Title VII and 42 U. S. C., Sec. 1981 (A. 4a-9a). Respondent moved to dismiss the Complaint on grounds that:

1) Plaintiff failed to file a timely charge with the EEOC, 2) Plaintiff failed to commence her court action within the time limits of Title VII, and 3) Plaintiff's Section 1981 claim is barred by the Tennessee Statute of Limitations. (A. 14a)

The District Court, on May 30, 1974, dismissed Guy's Section 1981 claim for failure to comply with the applicable Tennessee Statute of Limitations (Pet. 14a-19a);[2] no appeal was taken from this decision. The lower Court allowed the Title VII claim to stand, but reserved ruling on whether the limitation period under Title VII was tolled by the filing of a grievance. Respondent, by way of Motion to Reconsider filed on June 7, 1974, asked the Court to reconsider its order allowing the Title VII claim to stand. (A. 22a). The District Court, upon reconsideration, issued an order on June 12, 1974, in which it dismissed Guy's Title VII claim on the grounds that she had failed to file a charge with the EEOC within the ninety-day period required by Title VII. (Pet. 20a-24a). The District Court relying upon the rationale of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), rejected Guy's argument that the ninety-day period was tolled during the pendency of the grievance proceedings.

Guy, by motion dated June 14, 1976, asked the lower Court to reconsider its dismissal of the Title VII claim (A. 28a-29a). On June 19, 1974, the Court denied Guy's Motion to Recon-

[2] References designated "Pet." are to the Appendix to the Petition for a Writ of Certiorari in Case No. 75-1264.

sider and sustained its dismissal. Upon motions filed by both Guy and the Union, the District Court on August 26, 1974, dismissed the Complaint against the Union and re-aligned the Union as a party plaintiff (A. 30a-40a).

The Union and Guy appealed to the United States Court of Appeals for the Sixth Circuit on the basis that the District Court erred in refusing to hold that the ninety-day statutory period was tolled during the time Guy pursued her contractual remedies. On October 24, 1975, the Sixth Circuit held that the ninety-day period was not tolled and affirmed the dismissal of Guy's Title VII action. (Pet. 1a-12a).[3] On December 9, 1975, the Court denied Petitioner's request for a rehearing. (Pet. 13a).

SUMMARY OF ARGUMENT

A. Congress has established a comprehensive and definitive scheme for remedying employment discrimination under Title VII and has defined with precision the requirements necessary for the proper filing of a charge with the EEOC. Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-5(d)) is clear and unequivocal in its specification that a charge to be timely must be filed within ninety days from the date of the alleged unlawful employment practice.[4] Both the language of the Act and its legislative history demonstrate Congressional

[3] Contrary to Petitioners' assertion, the Court of Appeals did *not* hold that the 1972 amendment enlarging the period for filing an EEOC charge should not be applied retroactively to charges filed before the amendment. The Court expressly stated that it was not deciding this issue because it had not been raised in the District Court (Pet. 2a, 8a).

[4] Section 706(d) was amended by the 1972 Equal Employment Opportunity Act to increase the time for filing charges in non-deferral states to 180 days. As all relevant facts in this case occurred prior to the effective date of the Amendments, the ninety-day limitation is applicable, and will be cited hereinafter as either Section 706(d) or 42 U. S. C., Sec. 2000e-5(d).

concern for a prompt and specific filing period in order to avoid the litigation of remote charges and to prevent a respondent from being subjected to indefinite liabilities. Congress accomplished its objectives by the ninety-day requirement and the intent of Congress as expressed in Section 706(d) should be given effect.

B. Numerous remedies have been provided for discrimination in private employment and both Congress and this Court recognize that no one remedy is exclusive but all are equally available to an employee. The recent cases of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), together stand for the principle that Title VII, Section 1981 of the Civil Rights Act of 1866 and grievance-arbitration procedures are separate, distinct and independent forms of relief and because of the independent nature of each remedy, Section 1981 is not tolled by filing a Title VII charge. *A fortiori* this Court should also hold that the Title VII limitation period for filing a charge is not tolled by pursuit of a grievance-arbitration procedure.

C. There is absolutely no compelling reason to judicially engraft an exception onto the statutory limitation period. The timely filing of a charge is a jurisdictional prerequisite for any subsequent action pursuant to Title VII and the ninety-day requirement must be strictly construed. Application of a tolling theory is inappropriate in this case. The equitable doctrine of tolling was developed in order to avoid injustice in situations where a person is prevented through circumstances beyond his control from exercising his rights. At no time in the case at bar was Petitioner Guy prevented or hindered in any way from filing a Title VII charge; her failure to file within the statutory time period was no one's fault but her own. To apply tolling under these facts would be a misuse and an abuse of the equitable principle.

Adopting a theory of tolling will abrogate the definitiveness of the statutory limitation period and in essence will place in

the hands of the employer and employees the determination as to when a charge will be filed. Since the grievance procedure is created and controlled by the parties to a collective bargaining agreement, tolling during the pendency of a grievance process will make the statutory filing period dependent upon the designs of the employer and collective bargaining representatives. To allow a party to completely control the timing of his charge can only result in delay and prejudice. The prejudice to an employer is particularly great where, as here, racial discrimination was never alleged during the course of the grievance proceedings, and the Respondent was first put on notice that racial discrimination is in issue at the time the charge was filed. It is unfair to an employer to permit an employee, while pursuing one claim, to toll the limitation period on a completely different charge.

Strictly private acts cannot preserve or create rights that otherwise would not exist. Private attempts of parties at dispute settlement normally do not affect a statute of limitation for filing a claim, and there is no need to make an exception in this case. To do so can only entangle statutory and contractual remedies creating myriad problems and complexities.

II

The issue raised initially by Petitioners in their briefs that the limitation period should commence running from the date the grievance is denied is not properly before this Court and should not be reviewed as the question has not been litigated or decided by the lower Courts. The argument also lacks merit. The alleged discriminatory act which is the subject of grievance and the Title VII charge is the discharge on October 25, 1971. Even though Guy, as in any appellate process, had the right to appeal that decision through the grievance procedure, the act itself occurred and was implemented on October 25, 1971. De-

cisions hold that a discharge is a "completed act" at the time of occurrence, and it is that date which should start the running of the limitation period.

III

A. The question regarding retroactive application of the 1972 Amendments was raised for the first time by the EEOC, as *amicus curiae* in its brief to the Sixth Circuit Court of Appeals. An *amicus curiae* is not a party and has no standing to appeal an issue not raised by the parties. As the question of retroactivity was not before the District Court, the Sixth Circuit refused to consider or decide the issue. Neither of the lower Courts has litigated or determined this issue and, therefore, it is not properly before this Court for review.

B. Title VII both creates the right of action and confers the time within which that right must be asserted; therefore, when the prescribed period has run, both the substantive right and corresponding liability end. At the time Guy filed her charge, it was not only barred but any right of action she may have had under Title VII was extinguished. Applying the 1972 Amendment enlarging the time for filing a Title VII charge retroactively would result in the revival of a barred and extinguished claim, contrary to the established rule that an action which is already barred by limitations cannot be revived by an act of the legislature.

Congress' intent in enacting Section 14 of the Equal Employment Opportunity Act of 1972 was not to revive barred claims but to assure that the new enforcement authority granted the Commission was applicable to charges which were then in the process of investigation and conciliation. It would thus violate well established judicial principles as well as Congressional intent to hold that the 1972 Amendment enlarging the filing time applies retroactively to revive Petitioner's claim.

ARGUMENT

I

Pursuit of Contractual Remedies Should Not Toll the Limitation Period for Filing a Title VII Charge

The sole issue before this Court for review is whether the filing of a grievance pursuant to a collective bargaining agreement tolls the limitation period for filing a charge with the EEOC under Title VII. All relevant acts in this case occurred prior to March 24, 1972, and are governed, therefore, by the preamendment requirement that charges must be filed with the Commission "within ninety days after the alleged unlawful employment practices occurred." 42 U.S.C. Sec. 2000e-5(d).[5] It is undisputed that Petitioner Guy filed her charge more than ninety days from the date of her discharge, the alleged unlawful employment practice. The theory of Petitioners' suit, however, is that pursuit of the contractual grievance remedy tolled the statutory period under Title VII, making the charge filed on February 10, 1972 timely. This is the only issue which has been litigated and determined by the lower Courts. Both the District Court and Sixth Circuit have soundly rejected Petitioners' theory and it is urged that the proper conclusion requires this Court to do the same.

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[5] The ninety-day interval in Section 706(d) applies rather than the 210 days because Tennessee is a non-deferral state.

A. Congress did not intend the ninety day limitation period to be tolled by the filing of a grievance.

1. The Plain Meaning of the Language of Section 706(d) Should Be Given Effect as That is the Best Evidence of What the Legislature Intended.

This Court has stated that "(t)he basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent.' " *Burnett v. New York Cent. R. R.*, 380 U.S. 424, 426 (1965); *Midstate Horticultural Co. v. Pennsylvania R. R.*, 320 U.S. 356, 360 (1943). It has been reiterated many times by the Courts that the primary evidence of legislative intent is the language of the statute. Indeed, there is no better settled canon of interpretation than that which states that language clear and unambiguous must be held to mean what it plainly says. *Caminetti v. United States*, 242 U.S. 470 (1917).

Nothing could be plainer or more definite than the language of 42 U.S.C. §2000e-5(d) which provides that a charge "shall be filed within ninety days after the alleged unlawful employment practices occurred." The limitation requirement which Congress has established for filing charges with the EEOC is rational and fair to both charging party and respondent for it allows a gracious length of time for filing and yet protects a defendant from litigating remote charges by specifying a definitive limitation period. As Section 706(d) is plain and admits of no more than one meaning, its words should be given effect and the time limits prescribed by Congress in that Section should be enforced according to their expressed terms.

2. The Legislative History of Title VII Does Not Support the Tolling Theory.

If statutory language is clear and unequivocal there is no need to refer to legislative history. Legislative history is signifi-

cant only where there is ambiguity to be resolved or where there is a need for interpretation because of an absurd or unreasonable effect by application of the literal words of the statute. *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945). Although it is unnecessary to refer to legislative history as the statutory language of Section 706(d) is conclusive and equitable in application, an examination of the legislative record supports the construction which both lower Courts in this case have adopted.

The ninety-day limitation period for filing charges with the EEOC originated in the Senate substitute version of the omnibus civil rights bill H.R. 7152, 88th Cong., 1st Sess. (1963). Title VII of H.R. 7152, as originally passed by the House, did not specify a time limit on filing with the Commission.[6] The Senate version, however, which was approved by the House without change on July 2, 1964, contained a comprehensive scheme for filing and processing charges which included the ninety-day filing limitation. 110 Cong. Rec. 16001-4 (1964); *See also* Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3026 (1967) hereinafter cited as Legislative History.

Only one exception to this ninety-day requirement was established, i. e. where a person has instituted proceedings with a state or local fair employment agency such person is granted an extended period of time within which to file with the EEOC.[7]

[6] Although the House bill did not prescribe a limitation period for filing a charge with the EEOC, it did provide that no civil action could be based on an unlawful employment practice occurring more than six months prior to the filing of a charge with the Commission. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3026 (1967).

[7] Section 706(e) of the Civil Rights Act of 1964 (42 U. S. C. Sec. 2000 e-5(e) states that if a person first institutes proceedings with a state or local agency a charge shall be filed with the EEOC "within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the state or local agency has terminated the proceedings

The purpose of this exception was to accommodate state fair employment laws with the provisions of Title VII. There is no indication that Congress envisioned any other circumstance which would necessitate the extension of the ninety-day period. Applying the principle of construction "to express one thing is to exclude all others", it follows that since Congress provided for only one circumstance where the time for filing would be longer than ninety days, it did not intend there be any other exceptions to its ninety-day requirement.

Congress had the opportunity to add other exceptions in 1972 when it reconsidered and amended provisions of Title VII; however, the only change made in Section 706(d) was the expansion of the time limitation for filing charges from 90 days after an alleged unlawful employment practice has occurred to 180 days in non-deferral states and from 210 days to 300 days where deferral to state or local agency is required. The purpose in expanding the time periods, as stated in the "Section-by-section analysis" is to give aggrieved individuals "a greater opportunity to prepare their charges and file their complaints and that existant but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight." 118 Cong. Rec. S. 7167 (March 6, 1972); 118 Cong. Rec. H. 7564 (March 8, 1972).[8] Congress was satisfied that this purpose was

under the state or local law, whichever is earlier." The extension of the period for filing with the EEOC for those persons who first invoked state procedures was part of a Congressional plan of cooperation between federal and state authorities in handling charges of discrimination. Congress sought to utilize state fair employment laws and procedures to the maximum extent possible and to this end adopted a deferral plan whereby state and local agencies are given first opportunity to act on a charge of discrimination. *See* comments by Senator Clark (D., Pa.) and Senator Humphrey (D., Minn.), 110 Cong. Rec. 7205; 12721-5; Also printed in Legislative History 3003-8; 3344-5.

[8] Although Congress stated its approval of cases which had interpreted the time limitation to benefit the employee, reference was specifically to the deferral procedure sanctioned in *Love v. Pullman Co.*, 404 U. S. 522 (1972) and to decisions adopting the "continuing" theory of discrimination. Neither of these issues is involved in the present case.

accomplished by increasing the time limits for filing charges. It did not consider it necessary to augment the 180-day and 300-day limitation periods by inscribing a rule of tolling.

Of primary concern to Congress was the need for a definitive period of time for filing charges with the Commission. The absence of Congressional debate or discussion over the Senate Amendment to incorporate time limitations is evidence of the unanimous support which such proposal received. Senators and Congressmen who opposed other provisions of Title VII concurred in the necessity of adopting a precise statute of limitation in order to preclude respondents from being subject to indefinite liabilities and to prevent the litigation of stale charges. *See* 2 U. S. Code Congressional and Administrative News 2175 (1972)

Even where Congress allowed an extension of the ninety-day period in the case of persons filing with state or local agencies, Congress, nonetheless, set a maximum period of two hundred and ten days for filing charges with the EEOC. The fact that a ceiling of two hundred and ten days was established shows that Congress did not intend that the time for filing with the Commission be completely subject to the period for processing a charge before a state or local agency. The possibility of prolonged proceedings before state and local agencies and the resulting indefinite delay in filing with the Commission prompted Congress to write into Title VII certain controls.[9] The portent of such statutory limits cannot be ignored in deciding the present issue. Petitioners' "bootstrapping" position of tolling allows

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[9] In addition to the establishment of a maximum filing period of two hundred and ten days, Congress also set a specific time limit within which state and local agencies are afforded the opportunity to act. Under the deferral scheme of Title VII, state and local agencies are given sixty days within which to seek resolution of a charge, and upon expiration of the sixty-day period, the EEOC may begin its proceedings on the charge. 42 U. S. C., Sec. 2000 e-5(d), as amended.

for no control by Congress—rather, it makes the time for filing charges totally dependent upon the diverse and uncertain periods and procedures for processing grievances designed by employers and collective bargaining representatives. If Congress refused to allow state and local governmental agencies an unlimited period for processing charges, then certainly it is not its intent that the filing of a charge with the Commission be delayed for an indefinite and indeterminable time while parties pursue private contractual remedies.

B. Legal precedent establishes that a limitation period is not tolled by pursuit of separate, alternative remedies.

The question at issue whether pursuit of a contractual remedy tolls the limitation period of Title VII is closely analogous to the issue posed in a variety of factual situations as to whether a statute of limitation is tolled by pursuit of administrative remedies. It is a well-settled rule, for example, in cases involving claims against the United States, that "[w]here the filing of an administrative claim or other proceeding is not made a statutory prerequisite to suit but is only permissive, the statute of limitations is not tolled by the pendency of such a claim." *Camacho v. United States*, 494 F. 2d 1363, 1369 (Ct. Cl. 1974); *See Soriano v. United States*, 352 U. S. 270 (1957). The basis for this rule was aptly expressed in *O'Callahan v. United States*, 451 F. 2d 1390 (Ct. Cl. 1971) and applies with equal if not greater force to contractual remedies:

> "We have repeatedly held . . . that it is a 'recognized, oft-repeated principle that optional administrative remedies do not defer or toll the statute of limitations.' To hold otherwise would serve to induce a potential claimant to sit on his right of action, while running the gantlet of permissive reviews through Boards of Review, Correction or Appeal, all the while running up pay and allowances be-

fore finally seeking relief in the Court of Claims. *See, Crowe v. United States*, 452 Ct. Cl. 1034, decided today. This is not within the spirit or intention of statutes of limitation." (451 F. 2d at 1393)

The principle that a statute of limitation is not tolled by pursuit of administrative remedies has been applied in cases involving claims of employment discrimination. Recently, this Court had occasion to rule on the question of tolling with respect to the relationship of Title VII and Section 1981 of the Civil Rights Act of 1866 in the case of *Johnson v. Railway Express Agency, Inc., supra.*[10]

The issue presented in *Johnson* was whether the timely filing of a charge of employment discrimination with the EEOC tolls the running of the period of limitation applicable to an action based on the same facts instituted under 42 U. S. C., Sec. 1981. Petitioner Johnson advanced similar arguments to support his position of tolling that are being urged by Petitioners in the instant case. This Court after carefully considering the legislative history of Title VII rejected Johnson's position and held that the filing of a charge with the EEOC does not toll the statute of limitations applicable to Section 1981. The basis for this decision was that Title VII and Section 1981 "although related, and although directed to most of the same ends, are [nonetheless] separate, distinct, and independent." 95 S. Ct. at 1721.

Johnson relied upon *Alexander v. Gardner-Denver Co., supra*, a case in which the relationship of the various employment remedies, and in particular Title VII and the grievance-arbitration machinery of collective bargaining agreements, was

[10] Of interest is the fact that *Johnson* follows the same case history thus far as the case at bar. District Court Judge Harry Wellford who decided the instant issue also decided the *Johnson* case. His opinion in *Johnson* was affirmed by both the Sixth Circuit Court of Appeals and the Supreme Court.

the subject of extensive discussion.[11] In *Alexander*, this Court after careful examination of legislative history and of the functions and procedures of Title VII and the grievance-arbitration process concluded that the two remedies are "legally independent" in origin and are of a "distinctly separate nature." In discussing the difference between submitting a grievance to arbitration and filing a suit under Title VII, the Court said:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Rleations Act, as amended, where disputed transactions may implicate both contractual and statutory rights." 415 U. S. at 49-50.

The principle is thus established in fair employment law that Title VII, Section 1981 and grievance-arbitration procedures are separate, distinct and independent forms of relief. Based upon the independent nature of each remedy, pursuit of administrative remedies pursuant to Title VII does not suspend the limitation period applicable to a Section 1981 suit.[12]

[11] *Alexander* holds that an employee's statutory right to a trial *de novo* under Title VII is not foreclosed by prior submission of his claim to final arbitration under the non-discrimination clause of a collective bargaining agreement.

[12] Recent decisions have relied upon *Alexander* and *Johnson* in holding that the pendency of an administrative remedy does not suspend the limitation period of a federal statutory remedy. The Eighth Circuit in *Chambers v. Omaha Public School District*, — F. 2d —, 11 EPD Para. 10,911 (8th Cir. 1976) citing *Johnson, Ca-*

A fortiori pursuit of contractual remedies should not toll the limitations period for filing a Title VII charge. The right to pursue a Title VII remedy is in no way dependent upon resort to or exhaustion of a private contractual remedy; rather, Title VII offers a separate and additional forum for resolving claims of discrimination. If this Court declined to allow a federal statutory right to toll a state statute of limitation, then certainly the mere filing of a grievance pursuant to a contractual agreement should not suspend the Congressional scheme for filing Title VII charges.[13]

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macho, supra, 494 F. 2d 1363, and *Soriano, supra,* 352 U. S. 270, held that a teacher's permissive resort to Department of Health, Education and Welfare (H. E. W.) remedies pursuant to 42 U. S. C. Sec. 2000(d) will not toll the statute of limitations applicable to a Section 1981 or Section 1983 claim. In *Washington v. Chrysler Corp.,* — Mich. App. —, 12 EPD Para. 11,023 (1976), the Court held that a racial discrimination claim filed with the state Civil Rights Commission does not toll the running of a statute of limitations applicable to a civil action based on the same facts. In so holding, the Court stated that it was following recent decisions by this Court which have stressed the independence of the contractual and statutory rights which an employee may assert against discriminatory employment practices. *See also International Union of U. A. W. v. Hoosier Cardinal Corp.,* 383 U. S. 696 (1965), holding that an unsuccessful class action brought by employees in a state court did not toll the state statute of limitation for bringing suit in federal district court under the Labor Management Relations Act, and *Barnhart v. Western Maryland Ry.,* 41 F. Supp. 898 *aff'd,* 128 F. 2d 709 *cert. denied,* 317 U. S. 671, where pursuit of relief from Railroad Labor Board, National Mediation Board and other federal departments or agencies did not toll the applicable statute of limitation for invoking federal jurisdiction.

[13] *Alexander* and *Johnson* have been the bases for lower Courts' holdings that resort to grievance procedures under a collective bargaining agreement does not toll a statutory limitation period. *See Sled v. General Motors Corp., Fisher Body Div.,* 405 F. Supp. 987 (E. D. Mich. 1976); *Chrysler Corp. v. Michigan Civil Rights Commission,* — Mich. App. —, 12 EPD Para. 11,031 (1976); *Roberts v. Lockheed Aircraft Corp.,* — F. Supp. —, 11 FEP Cases 1440 (C. D. Calif. 1975); *See also* cases predating *Alexander* and *Johnson* holding that contractual grievance proceedings do not toll a statutory limitation period, e. g. *Beach v. International Union of U. A. W.,* 19 Mich. App. 560 (1969); *Condol v. Baltimore & O. R. Co.,* 199 F. 2d 400 (D. C. 1952).

C. There is no compelling reason to engraft an exception onto Section 706 (d)

1. The Ninety-Day Limitation Period Is Jurisdictional and Should Not Be Suspended by the Equitable Doctrine of Tolling

At issue in the case at bar is not just a general statute of limitation but, rather, a comprehensive statute which creates a new cause of action and which contains a specific time limit thereon. Time restrictions contained in the same statute which creates the cause of action act as a limitation on the right itself, and are subject to a more strict construction than ordinary statutes of limitation.[14] The jurisdiction of the federal courts to hear Title VII actions is derivative from the statute itself and the ninety-day period for filing a charge with the EEOC is a jurisdictional prerequisite to bringing suit. *McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 798 (1973).

Unlike ordinary statutes of limitation which are subject to waiver and other equitable considerations, a jurisdictional defect cannot be waived or cured even by consent of the parties. If the jurisdictional prerequisite, which operates as a condition of liability, has not been met, there can be no recovery because the Court lacks subject matter jurisdiction and must dismiss. As the ninety-day limitation period for filing Title VII charges is jurisdictional, it must be strictly construed and may not be suspended by adopting the equitable doctrine of tolling.

Despite clear pronouncements by this and other courts that the ninety-day limitation in Title VII is jurisdictional, some

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[14] *EEOC v. Louisville and N. R. R.,* 505 F. 2d 610 (5th Cir. 1974), *cert. denied* 423 U.S. 824 (1975); *United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U. S. 157 (1914). The Court of Appeals in its opinion below espouses these principles and cities in support this Court's opinion in *The Harrisburg,* 119 U. S. 199 (1886) (Pet. 5a-7a)

courts have discussed the limitation period in terms analogous to how statutes of limitations are construed. Petitioners, here, by urging tolling, would have this Court apply to the ninety-day requirement the same type of equitable modification that is applied to statutes of limitation. Even assuming this Court finds it appropriate to consider equitable principles, Petitioners arguments for tolling the ninety-day period are not meritorious.

An examination of the case law on statutes of limitation and the circumstances which have been held to warrant suspension of the limitation period shows that the facts of the instant case are not such as to merit application of the equitable doctrine. It is an established principle of statutory construction that restraint must be exercised in interpreting statutes of limitation and such statutes are not to be construed so as to defeat their intent to secure prompt enforcement of claims. *Kavanagh, Collector of Internal Revenue v. Noble*, 332 U. S. 535 (1947), *rehearing denied* 333 U. S. 850 (1948); *Campbell v. Haverhill*, 155 U. S. 610 (1895). Decisions evidence a wariness against expanding the jurisdiction of the federal court by judicial interpretation. *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17 (1951); *Jerome v. Viviano Food Co.*, 489 F. 2d 965 (6th Cir. 1974). As this Court stated in *Holmberg v. Armbrecht*, 327 U. S. 392 (1946):

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." 327 U. S. at 395.

Courts have been exceedingly guarded in implying exceptions which would enlarge time periods and recognize only a limited class of exceptions arising from absolute necessity. Justification for a tolling theory lies in the general rule that "whenever some paramount authority prevents a person from exercising his legal remedy, the time during which he is thus prevented is not to be counted against him in determining whether the statute of

limitations has barred his right." *Wagner v. New York, Ontario and Western Ry.*, 146 F. Supp. 926, 929 (M. D. Pa. 1956), and cases cited therein. Thus, the crux of the tolling principle is that plaintiff has been *prevented* through no fault of his own from exercising his rights. In such cases, the Court has attempted to prevent the injustice of penalizing a person who is incapable of bringing suit.[15]

Petitioner, in the case at bar, was operating under no handicaps which prevented or hindered her from filing a timely charge with the EEOC. She was not tricked or misled in her actions, and she cannot claim detrimental reliance on an erroneous administrative opinion or policy decision.[16] Petitioner was fully able at any time during the ninety-day period to file a charge; she simply failed to comply with the time limitations of Title VII. There is no justifiable reason in the case at bar for not applying the explicit filing period designated in Title VII. There is nothing unduly burdensome or unreasonable in requiring an employee who desires to pursue both contractual and statutory remedies to file within the time limits for each remedy. This asks a person to do nothing more than follow the requirements prescribed for each remedy.[17]

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[15] Circumstances which hinder or prevent suit and which, therefore, have been recognized by courts as cause for suspending the running of a statute of limitation fall into three categories: Those in which plaintiff's cause of action has been fraudulently concealed from him; those resulting from a legal prohibition against suit; and those in which plaintiff is operating under a disability preventing initiation of suit. Developments in the Law "Statutes of Limitations," 63 Harv. L. Rev. 1177, 1220-1237 (1950); "Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment," 72 Yale L. J. 600 (1962-63).

[16] *See Ferguson v. Kroger Co.*, — F. Supp. —, 11 EPD, Para. 10,720 (S. D. Ohio 1975), holding that the filing of discrimination charges with the wrong EEOC regional office did not toll the jurisdictional prerequisite of timely filing with an appropriate state agency in the absence of evidence that plaintiff had acted on misinformation by the agency.

[17] It is significant that Guy in the charge filed with the EEOC and the Complaint filed in Federal District Court also accused the

2. To Permit Tolling Will Allow Parties to a Collective Bargaining Agreement Through the Grievance Procedure They Design to Determine the Time for Filing a Charge.

Congress, which so meticulously prescribed the procedure and time period for filing all charges with the EEOC, never intended its prescriptions to be dependent upon the multifarious approaches and limitation periods for resolving grievances devised by employers and collective bargaining representatives. A study by the Bureau of Labor Statistics conducted in 1964 of 1,717 major agreements shows that the process through which unresolved disputes move from complaining worker to ultimate settlement varies considerably among agreements, reflecting different plant and company organizational or decision-making structures. Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Grievance Procedures*, Bull. No. 1425-1 (1964). The study found that grievance procedures range from a simple informal one-step process to highly formalized procedures of six or more steps, culminating in mediation and/or arbitration.

Equally as varied are the time limits established by the parties for processing an employee's grievance. While some collective bargaining agreements designate time intervals for each phase of the procedural steps, including time limits on management's answer in each step, other agreements fix only an overall time for completion of the process. Some agreements contain no time limits at all for processing grievances: others simply

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Union of racially discriminatory conduct in not adequately representing her. Equity would dictate that at the very least, Petitioner should not be entitled to the equitable doctrine of tolling where she by her conduct has admitted that, in her view, the grievance procedure was not sufficient to adequately treat or remedy her claim of racial discrimination, assuming *arguendo* that she had perceived such a claim at the time her grievance was processed.

specify a "reasonable" time.[18] Although most agreements contain limitations on the initial submission of a grievance, the study by the Bureau of Labor Statistics reports that limits may range from as little as two or three days after occurrence of the event giving rise to a grievance to intervals as long as a year. Bull. No. 1425-1, pp. 37-41. Furthermore, different limitation periods may be prescribed for different types of grievances. Limitations on the time for appealing to subsequent steps of the grievance procedure were found to range anywhere from several days to several months, with many contracts containing provisions permitting extension of time limits for an indefinite period. Thus, depending upon the agreement reached by the parties the time allowed to complete a grievance procedure may be several days, several months or several years—the determination lies with each employer and collective bargaining representative, subject only to ratification by the employees.

Clearly, a statutorily prescribed limitation period should not be made contingent upon a process indeterminate and variable in duration. To accept Petitioners' tolling argument will suspend, in each case, the time for filing a charge with the Commission for a different period of time, dependent upon what the parties to a collective bargaining agreement establish. It is obviously not the intent of Congress that the time for filing a Title VII charge should be so indefinite and uncertain.

To toll the ninety-day requirement of Title VII during the pendency of a grievance will undoubtedly result in charges of discrimination being filed months and even years after the time limits imposed by Congress have expired. Essentially, the determination of when a charge shall be filed will rest, not with Congress where it should lie, but with the parties to a collective

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[18] For a discussion of the variety of limitation periods for processing grievances adopted by parties, see Elkouri and Elkouri, *How Arbitration Works*, 146-54 (Third ed. 1973).

bargaining agreement. If the tolling theory were upheld, the parties would be able to manipulate the time for filing charges with the EEOC not only by the grievance procedure they design but also by their conduct in applying the process. To permit a party to exercise complete control over the timing of his charge will inevitably foster delay. Arbitration annals are replete with cases in which, despite specific time limits, parties have delayed months and years before proceeding to subsequent steps in the grievance procedure.[19] Indeed, it is a recognized principle of arbitral law that the practice of parties in loosely applying time limits for processing grievances excuses rigid adherence to these limitation periods; time limits become suggested restraints, rather than rigid rules for appeal. *Coca Cola Co.*, 65 Lab. Arb. 165, 169 (Crane, 1975), *How Arbitration Works, supra* n. 18 at 146-54.

Far from being an expeditious method with a definitive time period for resolving disputes, the grievance procedure too often is an indefinite, time-consuming process by which either party can harass the other through excessive resort to filing and deleterious delays in processing grievances. The potential for abuse and harassment against an employer would be even greater if Petitioners' argument were accepted because a grievant could file a grievance tolling the Title VII limitation period, leisurely proceed to prosecute his grievance through a grievance procedure, and years later file a timely charge claiming dis-

[19] *See, e.g. Bell Aircraft Corp.*, 24 Lab. Arb. 324 (17 month delay between second and third step of grievance procedure; arbitration award issued 5½ years after alleged unlawful incident occurred); *West Virginia Pulp and Paper Co.*, 39 Lab. Arb. 163 (Union delayed 11 months in requesting list of arbitrators); *Lake Shore Coach Co.*, 44 Lab. Arb. 1190 (Discharge grievance discussed with employer at irregular intervals over period of ten months before demand for arbitration was made); *Boston Mut. Life Ins. Co. v. Insurance Agents' Int'l. Union*, 268 F. 2d 556 (1st Cir. 1959) (Union delayed 10½ months after final meeting with employer before requesting arbitration). *Flintkote Co.*, 51 Lab. Arb. 74 (2 month delay in choosing arbitrators; arbitration award issued 10 months after grievance filed).

crimination based on Title VII. If a grievant, during the course of the grievance proceedings, merely alleged "unfair action" on the part of the employer, as was alleged in this case, then it would be years after the alleged unlawful incident occurred before an employer would know that he was being accused of actions violative of Title VII.

Incorporating the principle of tolling into the filing scheme of Title VII will only result in further delay in filing and processing charges with the EEOC. In designing the procedures of Title VII, Congress has specifically set a limitation period and has manifested its intent that there be a *precise* period within which charges are to be filed. It would thwart Congressional intent to permit tolling and thereby place in the hands of the employer and employees the determination as to when a charge shall be filed.

3. To Toll the Ninety-Day Requirement Is Prejudicial to a Respondent Where Racial Discrimination Was Never Alleged in the Grievance Procedure.

To sanction tolling under the facts of this case would be unjust and prejudicial to Respondent inasmuch as Petitioner Guy never raised the allegation of racial discrimination during the entire course of the grievance proceedings. The grievance submitted and processed under the collective bargaining agreement protests "unfair action" on the part of Respondent in discharging Guy (A. 18a). There is no reference in the written grievance to any provision of the contract which it is alleged was violated by Respondent. It is undisputed that racial discrimination was not explicitly alleged and neither can it be argued that there is an implied allegation of racial discrimination. The phrase "unfair action" is not synonymous with "racial discrimination" and does not necessarily imply reference to the

non-discrimination clause of the Agreement in effect at the time Guy's grievance was filed.[20]

The first knowledge Respondent had that racial discrimination was in issue was upon receipt of the notice of the charge filed by Guy 108 days after her discharge. Her assertion of racial discrimination and resort to the EEOC were afterthoughts, pursued only after her first claim was unsuccessful. Contrary to Petitioners' contention, Guy has not diligently prosecuted her claim of racial discrimination, but has slept on her rights, asserting racial discrimination well beyond the statutory limitation period of Title VII.[21]

The failure to put Respondent on timely notice that it would be forced to defend a claim of racial discrimination is prejudicial to Respondent. The evidence necessary to defend under a grievance-arbitration procedure an allegation that a discharge constituted "unfair action" is not necessarily the same evidence needed to defend a charge of racial discrimination with the EEOC based on the same set of facts. The issue in a grievance-

[20] In the context of labor-management relations, an allegation of "unfair action" against an employer customarily connotes conduct disparaging to an employee because of his status as a Union member or supporter. *Park & Tilford Import Corp. v. Teamsters Local 848*, 27 Cal. 2d 599, 165 P. 2d 891, 900 (1946); *J. F. Parkinson Co. v. Building Trades Council of Santa Clara County*, 154 Cal. 581, 98 P. 1027, 1029 (1908).

Article XXXI, the non-discrimination clause of the 1969 Agreement, which was effective in 1971, forbade discrimination on the basis of "sex, race, color, or creed". Therefore, assuming *arguendo*, "unfair action" could imply a violation of the non-discrimination article, Respondent would not know the exact basis of discrimination which grievant is protesting.

[21] A review of the history of Petitioner's actions in this case demonstrates her lack of diligence in pursuing her claims: The Chief Steward, not Petitioner, filed her grievance. Despite Petitioner's claim there is no evidence that she actively processed her grievance through the grievance procedure. Petitioner waited almost three months after the grievance was denied before she filed her charge with the EEOC. Twenty-one months later, the EEOC issued a determination letter, together with a right to sue letter, finding no

arbitration process is whether the employer had just cause to discharge a grievant; the focus in a racial discrimination charge before the EEOC is whether the charging party was treated differently from persons of other races similarly situated. Although an employer may have "just cause" under a grievance procedure for discharging an employee, if the employer administers disciplinary action disparately he has violated Title VII. Essential in a determination by the EEOC is the comparative data submitted by an employer. An employer who is not put on timely notice that racial discrimination is in issue does not have the opportunity to protect itself against the loss of evidence,[22] the disappearance and fading memories of witnesses and the unfair surprise that results from asserting a claim that has been allowed to slumber. It is plainly unfair that a defendant should gather his evidence and prepare his defense against one theory of liability and then long after the statutory period of limitations has expired be forced to defend a completely new claim.

4. The Remedies Available for Racial Discrimination in Employment Are Legally Separate and Independent and Should Not Toll One Another.

The efforts to remedy employment discrimination have produced a variety of forums and alternative bases for obtaining

cause to believe Petitioner had been discriminated against. Petitioner could have obtained a right to sue letter during this twenty-one month period—she did not. After receiving the determination letter and right to sue notice, Petitioner failed to act until the last day of the ninety-day period. At that time she simply went to the District Court Clerk's office to find out what she should do. The total course of conduct by Petitioner belies the claim that she acted with diligence throughout these proceedings.

[22] The EEOC requires employers to keep employment and personnel records only for six months, the length of time within which an employee must file a charge. (29 C.F.R. § 1602.14) If an employee waits until grievance proceedings are complete before filing with the Commission, it is likely the employer will no longer have necessary records.

relief. Among the remedies available to an employee in addition to Title VII and the procedures established under a collective bargaining agreement are the Civil Rights Act of 1866 (42 U. S. C. § 1981), the Fair Labor Standards Act as amended by the Equal Pay Act of 1963 and subsequent 1966 and 1974 amendments (29 U. S. C. § 201 et seq.), the National Labor Relations Act (29 U. S. C. § 151 et seq.),[23] and a host of state fair employment laws. If an enterprise is under contract with the Federal Government, Executive Order No. 11246 (3 C. F. R. 339 (1967)) establishing the Office of Federal Contract Compliance, offers another avenue of relief. A plaintiff, therefore, is able to pursue his claim of discrimination in a variety of forums including state courts, federal courts, state and municipal fair employment agencies, federal agencies, or the Department of Labor.

When Congress enacted Title VII, it was cognizant of the many remedies available for employment discrimination and specifically refused to make any one remedy the exclusive means for relief.[24] *See* 110 Cong. Rec. 7207 (1964), interpretative memorandum by Senator Joseph Clark, one of the sponsors of the Senate Bill. This Court noted in *Alexander, supra*, that Congress has clearly manifested its intent that a person be allowed

[23] Although the National Labor Relations Act was enacted primarily for purposes other than preventing racial discrimination, such cases as *NLRB v. Miranda Fuel Co.*, 326 F. 2d 172 (2d Cir. 1963) and *United Packinghouse, Food and Allied Workers Int'l Union v. NLRB*, 416 F. 2d 1126 (D.C. Cir. 1969), *cert. denied* 396 U. S. 903 (1969), have established the principles that Section 7 of the NLRA gives employees the right to be free from racially discriminatory practices, and that discrimination on the part of an employer violates Section 8 (a) (1) of the NLRA.

[24] The Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices 110 Cong. Rec. 13650-13652 (1964) and a similar amendment was rejected during the debate over the Equal Employment Opportunity Act of 1972. See H. R. 9247, 92d Cong., 1st Sess. (1971) and 2 U. S. Code Cong. and Admin. News, 92d Cong. 2d Sess. (1972) pp. 2137, 2179, 2181-2182.

to pursue his rights independently under the various remedies. Title VII is equally available to an employee regardless of whether that employee waives, ignores or concurrently pursues contractual rights.

Each available remedy for employment discrimination provides distinct techniques and procedures, including separate limitation periods. These limitation periods vary in origin, duration and in the procedures designed to commence the running of the period. Considering the number of remedies established for employment discrimination, it is obvious that if each remedy were allowed to toll the limitation period for every other remedy the effect would be to permit ten to twenty-year-old claims to be litigated.

By according independent, parallel remedies against discrimination an employee can avail himself of the distinct advantages of each remedy unencumbered by any defects or impediments associated with other remedies. To permit tolling, however, will obviate this advantage and entangle each tolled remedy in the complexities and obstacles of the tolling remedy. Thus, to suspend the limitation period in Title VII during the pendency of a grievance will enmesh the statutory remedy with myriad contractual problems, and will force courts to decide issues of contract interpretation which are properly reserved for arbitrators.

For example, since grievance procedures differ under each collective bargaining agreement, to allow tolling will necessitate a determination in each case as to when and how a grievance is filed under the grievance-arbitration provisions and as to whether an employee has properly complied with the prescribed procedure.[25] In addition, courts will be confronted

[25] Many agreements do not specify with clarity just how grievances may be initiated. Some agreements leave it to the employee to decide whether he wants to make a direct complaint to the super-

with uncertainties as to when the tolling period ceases. Tolling the Title VII period during the pendency of a grievance could result in the permanent suspension of the Title VII limitation period, because it is possible that a contractual grievance procedure may never be completed. Since the Union is responsible for processing a grievance through the various steps of a grievance procedure a Union could fail to press a grievance to conclusion. An employee, then, would always be able to successfully argue, no matter when he filed a Title VII charge, that it is timely.

Even if a grievance is submitted to arbitration and an award issued, this is not necessarily the end of the process as a grievant may seek judicial review of an arbitrator's award. Waiting until the judicial procedure is complete could well mean that the limitation period of Title VII is tolled for several years. It is also commonplace for challenges to arbitrability to be coupled with a grievance and raised by a party either before the arbitrator or in the courts. The issue of arbitrability is of significance only to the contractual remedy; yet, adopting a tolling theory will suspend the time for filing a charge until both the issue of arbitrability and the merits of the grievance are resolved. There is no justification for delaying the resolution of the merits of

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visor or refer the problem initially to a union steward. In such contracts it is often unclear as to which of the two—the employee or steward—is authorized to launch a formal grievance process. 2 BNA Coll. Barg. Neg. and Contracts 51:1 (1970) As Section 9 (a) of the National Labor Relations Act (29 U. S. C. § 159) allows employees to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, the court will have to decide in each case whether an employee in making a complaint was utilizing the prescribed grievance procedure or attempting to adjust his complaint on his own. If the court determines that an employee has resorted to a grievance procedure and if the agreement is unclear as to what action commences the grievance process a court may then be faced with a determination of whether an employee's oral complaint to a supervisor will suffice to toll the Title VII limitation period or whether only a written complaint will toll the period.

a discrimination charge under a statutory remedy while a procedural issue of relevance only to the arbitration process is litigated.

Petitioners' prediction that the national labor policy favoring private resolution of disputes will be undermined and jeopardized unless tolling is adopted is completely groundless. (Brief for Petitioner in No. 75-1276 pp. 17-20; Brief for Petitioner in No. 75-1264, pp. 39-40). The Supreme Court, in *Alexander, supra*, points out that certain actions may violate both a collective bargaining agreement and Title VII of the Civil Rights Act. Other actions may violate only the collective bargaining agreement and the National Labor Relations Act. In both situations, the Court said "the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each." 415 U.S. at 50.

There is nothing to prevent an aggrieved person from filing a charge concurrently in the separate forums. Contrary to Petitioners' contention that a Title VII charge will hinder efforts to settle a grievance (Brief for Petitioner in No. 75-1276, p. 19; Brief for Petitioner in No. 75-1264, p. 32), it is submitted that the knowledge that an EEOC investigation will be conducted if settlement is not reached may provide the necessary impetus for an employer's resolution of the grievance. If a grievance is resolved favorably to a plaintiff under the grievance-arbitration machinery, he can simply withdraw his EEOC charge. Such a procedure would allow the plaintiff to take advantage of the different remedies and at the same time would preserve the precise time limits that Congress has established.

It is significant to note, also, that the filing of a grievance does not toll the limitation period for filing a charge with the

National Labor Relations Board.[26] The limitation period is strictly enforced and if a charge is not filed within the six-month period required by Section 10(b) of the Act, the Board refuses to process the charge. *See e. g. Schott's Bakery, Inc.*, 159 NLRB 1040 (1966); *Hilton Mobile Homes*, 155 NLRB 873 *enf'd in part on other issues*, 387 F. 2d 7 (8th Cir. 1967).

All of the arguments made by Petitioners to justify tolling have been considered and rejected by this Court in *Johnson, supra*, and are, in fact, entitled to even less weight in the instant case. Failure to toll the Title VII limitation period does not penalize an employee for resorting to contractual remedies as argued by Petitioners (Brief of Petitioner in No. 75-1276, p. 20, Brief for the United States as Amicus Curiae, p. 26), but merely requires that an employee observe the statutory time limits imposed. If there were no collective bargaining agreement in force, an aggrieved party would not be excused from timely filing with the EEOC, and there is no reason to excuse compliance with the jurisdictional requirements simply because an additional remedy has been provided by contract. "Title VII strictures are absolute", (*Alexander, supra*, at 51) and should apply equally to all employees regardless of their Union status.[27]

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[26] The Advice Memorandum upon which Petitioner in No. 75-1276, p. 19, n. 30 relies to support its assertion that the Office of the General Counsel of the NLRB sanctions a policy of tolling the Section 10(b) limitation period for filing an unfair labor practice charge while a grievance is pending was issued during the term of former General Counsel Peter G. Nash and was based upon those Title VII cases decided prior to *Johnson, supra*. There is no Board decision which has decided the issue and in light of *Johnson* and the appointment of a new General Counsel, John S. Irving, it cannot be assumed the Board would approve a tolling theory if presently faced with the issue. Of note, also, is the observation in the Advice Memorandum that under the NLRA, arbitration is afforded a far more significant and decisive role than under Title VII. Memorandum p. 10.

[27] Many non-Union companies also have procedures for adjusting disputes. If tolling during the pendency of a contractual remedy were approved, courts would then be faced with the question of whether Title VII is tolled by pursuit of other non-contractual procedures. To hold that Title VII is not tolled is to discriminate against non-Union employees for no reason. However, to hold that it is tolled will confront courts with a multitude of problems concerning these non contractual grievance procedures.

Based upon the foregoing arguments, it is respectfully submitted that the better-reasoned approach holds that Title VII is not tolled during the pendency of a grievance.

II. Petitioners' Contention That the Limitation Period Begins to Run From the Date the Grievance Is Denied Is Lacking in Merit

A. The issue has not been timely raised and should not be considered

Petitioners in their briefs to this Court raise as an issue for the first time in this case the contention that the ninety-day limitation period began to run from the date the Company denied Guy's grievance, rather than from the date of her discharge.

By asserting this issue initially in their briefs, Petitioners have violated one of the expressed rules of this Court prohibiting a party from raising additional questions in a brief on the merits. Rule 40 (1) (2) U. S. S. Ct., as amended 1975. It is an established policy that this Court will not decide a point urged in an attack upon a judgment below, where the question was not raised or litigated in the lower courts. *De Sylva v. Ballentine*, 351 U. S. 570, 582 (1956); *McCullough v. Kammerer Corp.*, 323 U. S. 327, 380 (1945); *Helvering v. Minnesota Tea Co.*, 296 U. S. 378 (1935); *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182 (1934). There is no reason here to depart from this principle.

B. The limitation period in Section 706(d) begins to run from the date of discharge

Termination of employment by discharge is not a "continuing violation," but is a "completed act" at the time it occurs. *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975); *Doski v. M. Goldseker Co.*, — F.Supp. —, 10 EPD Para. 10,528 (D. Ma. 1975); *Buckingham v. United Air Lines*, — F.Supp. —, 11 FEP Cases 345 (C.D. Calif. 1975). Any charge alleging a discriminatory discharge must be filed, therefore, within the time limits from the date of that completed act.

The argument that the limitation period began to run on November 18, 1971, at the conclusion of the third step of the grievance procedure, rather than October 25, 1971, the date of discharge, is based on the erroneous premise asserted that Guy's discharge was not final until the Company denied her grievance in writing. Such an assertion completely ignores the fact that Guy's employment relationship with Respondent was severed as of October 25, 1971.[25] The grievance steps were not a condition precedent to the decision to terminate but rather were the consequence of the Company's decision having been made and implemented. Petitioner by processing her grievance through the steps was merely exercising her right to appeal that decision.

If every decision made by an employer is considered "tentative and non-final" until an appellate process is exhausted, a limitation period could never commence until this Court had ruled on every issue. The absurdity of such a position is illustrated in this case. Almost five years have elapsed since the

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[25] *See Doski, supra,* holding that neither the employer's agreement to an extended severance pay arrangement nor the continuation of the complainant on the company health insurance policy could keep the employment relationship alive or otherwise toll the running of the time limit for filing a Title VII charge.

date of Guy's discharge and a court has yet to rule on the merits of Guy's complaint. If this Court decides the present procedural issue in favor of Petitioner, then it may well be another five years before the merits of the complaint are finally resolved. Adopting Petitioners' argument would mean that Respondent's decision to terminate Guy is still "tentative and non-final" not withstanding the fact that Guy has not been employed by Respondent since October 25, 1971.

An appellate process, whether in a grievance procedure or in the courts, is a challenge by the aggrieved individual to the correctness of a decision, and the fact that a person utilizes his right of appeal does not make that initial decision tentative. To hold otherwise would mean for example, that a lower court could never issue a final order, and yet, it is only final orders which are appealable.

Commencing the running of the limitation period as of the date the grievance is denied suffers the same defects and produces the same inequities as have been discussed previously with regard to the applicability of the tolling theory to the facts of this case. Because each grievance procedure is designed and controlled by the parties to a collective bargaining agreement, there is no accurate means of predicting when, if ever, a grievance procedure will be completed. Thus, under Petitioners' theory it could be years after the subject of the grievance occurred before the limitation period would even begin to run.

On the other hand, beginning the limitation period from the date employment was actually severed provides a definitive point in time from which to compute the period. *See Olson, supra.* An act of discharge is complete at the time the employment relationship is severed, regardless of whether or not an individual decides to appeal that decision. The appeal does not negate the finality of the decision at the time it was rendered.

Petitioner Guy in this case was protesting the Company's act in discharging her and was seeking reinstatement as the remedy.

A request for reinstatement would be meaningless unless the discharge had been implemented. Section 706(d) of the Civil Rights Act of 1964 requires that the limitation period for filing charges commence running from the date the alleged unlawful practice occurred. In this case, the alleged unlawful employment practice occurred October 25, 1971, and any charges filed with the Commission must be timely filed in relation to that date.[29]

III

The 1972 Amendment Enlarging the Time for Filing a Title VII Charge Is Not Applicable to This Case

A. The question regarding retroactive application of 42 U.S.C., Sec. 2000e-5(e) was not raised by a party with standing and is not properly before this court

The issue of retroactive application of 42 U.S.C., Sec. 2000e-5(e) was raised initially by the EEOC as *amicus curiae* in its brief to the Court of Appeals. An *amicus curiae* is not a party to a suit and has no standing to raise issues on appeal which were not raised by the parties. *Kansas City v. Kindle, Mo.*, 446 S.W.2d 807 (Mo. Sup. Ct. 1969); *State ex rel. Burg v. City of Albuquerque*, 249 P. 242, 31 N.M. 576 (Sup. Ct. 1926). The purpose of an *amicus curiae* is to advise the court on facts and

[29] Petitioner also argues that the Personnel Director's denial of the grievance on November 18, 1971, is in itself a discriminatory act which commences the limitation period. This Court does not need to reach a determination on this contention. In addition to the untimeliness of raising this issue initially in Petitioner's brief, Petitioner has never filed a charge with the EEOC alleging this as an unlawful employment practice and, therefore, the courts are without jurisdiction to consider this argument. The charge filed by Guy on February 10, 1972, states, "I was discriminated against because of my race (Negro) in that I was terminated while on sick leave, even though established procedures regarding sick leave were followed."

matters pending for determination. He cannot assume the function of a party but must accept the case before the court with the issues as presented by the parties. As the EEOC had no standing to raise the issue of retroactivity, the question is not properly before this Court for review.

As stated previously, the rule of practice is settled that this Court will not undertake to review issues which were not considered or decided by the District Court or Court of Appeals *Brockett v. Brockett*, 44 U.S. 691 (1845); *Walters v. City of St. Louis*, 347 U.S. 231 (1954); *United States v. Estate of Donnelly*, 397 U.S. 286 (1970). Only those questions which were definitively raised and litigated below may be reviewed. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220 (1927); *McGrath v. Manufacturing Trust Co.*, 338 U.S. 241 (1949); *California v. Taylor*, 353 U.S. 553 (1957).

There is no averment in the Complaint relating to retroactivity, nor was the issue litigated at the trial level. The only argument Petitioner Guy presented before the District Court was that the ninety-day period was tolled by the filing of a grievance pursuant to a collective bargaining agreement. That Petitioner was basing her case solely on the tolling theory is stated by Petitioner in Plaintiff's Motion to Reconsider the Court's Order Granting Defendant's Motion to Dismiss, "Our position is that so aptly described by the Sixth Circuit Court of Appeals in the case of *Schiff v. Mead Corp.*, — F.2d —, 3 EPD 8043 (6th Cir. 1970),[30] which we again reiterate should

[30] In *Schiff*, subsequent to an order by the District Court dismissing plaintiff's complaint for failure to file timely charges with the EEOC, the Commission having learned that plaintiff first initiated action under established grievance procedures reversed its prior determination that the charges were untimely. Because of the Commission's action in reversing its decision subsequent to the District Court's ruling and because of the reliance the District Court had placed upon the EEOC's interpretation and application of 42 U.S.C., Sec. 2000e-5(d), the Sixth Circuit vacated and remanded for further consideration the judgment of the District Court.

be controlling and dispositive of the issue now before this Court." (A. 29a).

Because the question of retroactivity was not raised in the District Court by any party to the case, the Court of Appeals held that the issue was not properly before the Court for consideration and refused to decide the issue.[31] The Court through Circuit Judge Weick stated, "The sole appellate issue is whether the filing of the grievance tolled the jurisdictional requirements of the Act." (Pet. 2a). Indeed, if the Sixth Circuit had considered the issue of retroactivity properly before it, they undoubtedly would have remanded the issue to the District Court for its consideration.

The only issue which has been decided by the lower Courts is that of tolling. As the issue of retroactivity has not been timely raised by a party with standing and as it has not been litigated or determined below, it should not be considered by this Court.[32]

B. 42 U.S.C., Sec. 2000e-5(e) should not be applied retroactively so as to revive petitioner's barred charge

Should this Court undertake to decide the issue of retroactivity, it is respectfully submitted that the Court should find

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[31] By way of dicta, the Sixth Circuit noted that as Petitioner's claim was barred and extinguished prior to the effective date of the 1972 Amendments, the increase of time to file charges allowed by these Amendments could not revive Petitioner's claim.

[32] It is argued in the Brief for the United States as Amicus Curiae, p. 11, that the question of retroactivity concerns a jurisdictional allegation and may be raised initially at the appellate level pursuant to 28 U.S.C., Sec. 1653 that, "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." The allegation in this case, however, is not one of defective jurisdiction, but rather is an assertion that the District Court possessed jurisdiction. It does not, therefore, come within the intent of 28 U.S.C., Sec. 1653.

that 42 U.S.C., Sec. 2000e-5(e) does not extend retroactively so as to revive Petitioner Guy's barred charge. It is a well-established principle that an action which is already barred by limitations when it is brought cannot be revived by an act of the legislature. *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.*, 266 U.S. 435 (1925); *Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U.S. 633 (1925); *James v. The Continental Insurance Co.*, 424 F.2d 1064 (3rd Cir. 1970). The limitation period in force at a time an action is brought governs the case and determines the right of a party to maintain suit. *Patterson v. Gaines*, 47 U.S. 550 (1848).

At the time Petitioner's action arose, the applicable limitation period for filing charges was ninety days. As discussed previously, the ninety-day requirement is more than a statute of limitation; it is a jurisdictional prerequisite to maintenance of any action pursuant to Title VII and is prescribed in the same statute which creates the right. Commenting upon the law with regard to extending such periods by Congressional amendment, the Court in *Snyder v. Yoder*, 176 F. Supp. 617 (N.D. Ohio, 1959), stated:

> "While as a general rule it is true that a period of limitations may be extended by an amendment of the statute of limitations, prior to the expiration of the previously controlling period, . . . the situation is different where the statute creating the right also prescribes the limitation period. In that event, it is held that compliance with the time limitation is a condition to the bringing of the action, and not just a limitation thereon, and that the limitation called for in the original statute bars the action, notwithstanding any amendment of the statute thereafter." 176 F. Supp. at 623.

The ninety-day period within which Petitioner could file a charge with the EEOC expired on January 24, 1972. Petitioner

did not file her charge until February 10, 1972. On this date, not only was Petitioner's charge barred as untimely but any right of action which Petitioner may have had pursuant to Title VII was extinguished. The ninety-day provision of the Act is a limit set to the power of the Commission as distinguished from a rule of law for guidance in reaching a decision. *Cf. Louisville Cement Co. v. I.C.C.*, 246 U.S. 638, 642 (1918).

Petitioners argue, however, that Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113 (March 24, 1972) applies 42 U.S.C., Sec. 2000e-5(e) retroactively, allowing the Commission to automatically assume jurisdiction over Petitioner's charge on March 24, 1972, the effective date of the Amendments. Section 14 of the Equal Employment Opportunity Act of 1972 states that "The amendments made by this Act to Section 706 of the Civil Rights Act of 1964 shall be applicable with respect to *charges pending with the Commission* on the date of enactment of this Act and all charges filed thereafter." (emphasis added). It is submitted that the sweeping interpretation of Section 14 which Petitioners urge this Court to adopt not only violates recognized rules of law prohibiting revival of barred claims but is supported neither by legislative history nor the common understanding of the word "pending."[33]

Section 14 was not included in the original 1972 Senate and House bills but was added by amendment on the floor. When

[33] The cases of *Brown v. GSA*, 44 U.S.L.W. 4704 (1976) and *Place v. Weinberger*, 44 U.S.L.W. 3714 (1976), relied upon by Petitioners are inapposite. (Brief for Petitioner in No. 75-1264, p. 46; Brief for Petitioner in No. 75-1276, p. 25). There was no allegation in either of these cases that the charge was not timely filed with the GSA Equal Employment Opportunity Office. Thus, unlike the situation here, the charges in *Brown* and *Place* were pending with the agency at the time Section 717 of Title VII was made applicable to them. Furthermore, *Brown* and *Place* were premised on the finding that the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment, a theory which has been repudiated with regard to discrimination in private employment.

reported out of their respective committees, both Senate and House bills specifically provided that the 1972 Amendments to Section 706 would *not* apply to charges filed prior to the effective date of the amendments. S. 2515, 92nd Cong. 2nd Sess., Sec. 13 (1972); H.R. 1746, 92nd Cong. 2nd Sess. Sec. 10 (1972). On February 21, 1972, Senator Jacob Javits (R., N.Y.) offered an amendment to delete the word "not" and thereby make the 1972 Amendments applicable to pending charges. 118 Cong. Rec. 4816, 92nd Cong. 2nd Sess. (Feb. 21, 1972). The amendment was proposed by Senator Javits at the request of the Department of Justice which was concerned that the new enforcement provisions of Section 706 would apply only to charges filed after its effective date of March 24, 1972. The sentiments of the Department of Justice were expressed in a letter to the Senate minority leader requesting the amendment:

> "We see no reason why the many thousands of persons who have filed charges which are still being processed and who have waited as long as 18 months to two years for resolution of them should not have the benefit of the new enforcement authority." Quoted in *EEOC v. Christiansburg Garment Co., Inc.*, 376 F.Supp. 1067, 1074 (W.D. Va. 1974); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1355, n.4 (6th Cir. 1975).

The purpose and concern of Congress in passing Section 14 was to make the new authority granted the Commission to bring suit against alleged violations applicable to pending claims. The intent was not to revive charges which were barred by failure to comply with the prescribed jurisdictional requirements. In fact, it probably never occurred to Congress that Section 14 would be used to apply time limits retroactively in order to revive barred charges. If such a thought had crossed their minds, then undoubtedly there would have been discussion of the proposed amendment. As it was, Section 14 was passed by the Senate without debate on the same day it was proposed. 118 Cong. Rec. 4816 (1972)

That Congress did not intend the expansive reading of Section 14 which Petitioners ascribe to it is also demonstrated by the expressed restriction of the applicability of the 1972 Amendments to charges pending with the Commission on the date of enactment of the Amendments. Thus, Congress did not intend the 1972 Amendments to apply to all charges filed prior to March 24, 1972, but only to those charges which can be classified as "pending" with the Commission as of that date. A charge that is barred and extinguished prior to March 24, 1972, cannot be interpreted to be "pending" on that date. To hold otherwise would distort the common understanding and meaning of the word "pending".

The few courts which have construed the word "pending" in the context of Section 14 have interpreted it to mean charges which are in the actual process of investigation, negotiation and conciliation by the EEOC. *See EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975); *EEOC v. Christiansburg Garment Co., Inc.*, 376 F.Supp. 1067 (W.D. Va. 1974); *EEOC v. United Aircraft Corp.*, 383 F. Supp. 1313 (D. Conn. 1974).

The mere acceptance by the EEOC of a charge filed by a charging party is not equivalent to the actual processing of a charge.[34] Although Petitioners argue that the EEOC accepted Guy's charge on February 10, 1972, and that the agency's determination as to its jurisdiction should be controlling (Brief for Petitioner in No. 75-1276, p. 25), what they fail to mention is that when Guy filed her charge, she told the Equal Employment Officer, as noted on the Charge of Discrimination, that the most recent date on which discrimination occurred was January 29,

[34] This distinction is noted in the Commission's rules on procedure where it is stated that in cases where the date of occurrence of the alleged unlawful employment practice is not known the charge should be accepted for later processing and the relevant dates determined during investigation. EEOC Compliance Manual CCH Para. 181, Sec. 2.1(e).

1972![35] Had the Commission been given the correct information by Guy, it undoubtedly would not have accepted her charge as timely, and it certainly cannot be argued that Guy in delaying her filing was relying upon a theory of tolling or that such acceptance by the EEOC of her charge was based in any way on tolling. Equity surely dictates that under these facts Petitioner Guy should not be allowed to profit from her own wrong.

As a creation of the legislature, the EEOC's authority is conferred and defined by statute. Title VII specifically limits the Commission's power to investigate and determine only those charges which have been timely filed. In this case, the Commission's authority to investigate and determine Petitioner's charge expired on January 24, 1972, because of the failure of Petitioner to file her charge within the defined statutory time period. As Petitioner's charge was barred on January 24, 1972, and as her right to pursue her Title VII remedies was effectively extinguished as of that date, it cannot be said that Petitioner's charge was "pending" with the Commission on March 24, 1972.

At the least, it can be said that the question of whether Congress intended the extensions of the statutory limitations period to be applied retroactively is uncertain. Even the Ninth Circuit which has indicated its view that the 180-day period should be applied retroactively has admitted that the question is "not free from doubt." *Davis v. Valley Distributing Co.*, 522 F. 2d 827, 830 (9th Cir. 1975).[36] It is a recognized rule of statutory con-

[35] There is absolutely nothing in the record to indicate the relevance of this date.

[36] In *Davis*, plaintiff filed his charge on March 14, 1972 with the EEOC, which referred the charge to the Arizona Commission on March 24, 1972. Two days later the Arizona Commission returned the charge to the EEOC without further action. The Ninth Circuit held that as appellant's claim was not formally filed until the EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, the charge fell within the literal words of the 1972 statute making the amendments applicable to all charges filed after

struction that "a law is presumed, in the absence of clear expression to the contrary to operate prospectively." *Hassett v. Welch*, 303 U.S. 303, 314 (1938); *Claridge Apartments Co. v. Commission*, 323 U.S. 141 (1944); *Fullerton-Krueger Lumber Co. v. Northern P. Ry. Co., supra; Weldon v. Bd. of Educ. School District, City of Detroit*, 403 F. Supp. 436 (E.D. Mich. 1975). There is no "clear expression" that Congress intended Section 14 to apply the increased time period of 42 U.S.C., Sec. 2000e-5(e) retroactively. To the contrary, both logic and reason as well as judicial opinion and the legislative history of the 1972 Amendments support the view that Section 706(e) should not be given retroactive effect in this case.

CONCLUSION

Based upon the foregoing authorities and arguments and the record as a whole, it is respectfully requested that the judgment of the Court of Appeals for the Sixth Circuit be affirmed.

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the effective date March 24, 1972. Thus, the Court's expression of its views on the retroactive application of 42 U.S.C., Sec. 2000e-5(e) is dictum.

Certificate of Service

I hereby certify that on August 27, 1976, three copies each of the foregoing were mailed, air mail postage prepaid, to counsel of record, Barry L. Goldstein, 10 Columbus Circle, New York, New York 10019 and Ruth Weyand, 1126 Sixteenth Street N. W., Washington, D. C. 20036.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

I. THE QUESTION OF WHETHER THE COMPLETION OF PROPERLY INVOKED GRIEVANCE-ARBITRATION PROCEDURES FIXES THE BEGINNING OF THE RUNNING OF TIME LIMITS FOR FILING OF AN EEOC CHARGE BY A DISCHARGED EMPLOYEE IS BEFORE THIS COURT

The courts below (Pet. App. 3a-7a, 27a-29a) both fixed the date of the "discriminatory event" (Pet. App. 24a, 27a) which began the running of the statute

of limitations as the date upon which Guy was initially discharged rather than the date upon which she received the final decision of the employer at the third step of the grievance procedure which informed her of the grounds on which she was discharged (App. 18a-19)a. The first of the questions presented set forth in the IUE's petition (p. 2) focused on whether the requisite time period was "calculated from the final denial of a grievance properly pursued under a collective bargaining agreement in force".

In the companion case, No. 75-1276, Guy's first question presented (Pet. Br. No. 75-1276, p. 3) is "Whether the limitation period for filing a charge with the EEOC begins to run from the final decision of a company after the completion of grievance-arbitration proceedings, or from the Company's initial decision prior to the commencement of those proceedings".

For these reasons Robbins & Myers, Inc. is not correct when it argues that this Court can not properly decide whether the running of the statute of limitations begins at the exhaustion of the grievance procedure rather than at the time of discharge (Res. Br. 31).

II. TOLLING DURING THE PENDENCY OF PROPERLY INVOKED GRIEVANCE-ARBITRATION PROCEEDINGS IS NECESSARY TO EFFECTUATE THE CONGRESSIONAL INTENT

Robbins & Myers in its restatement of the questions presented (Br. p. 2) contends that the ninety day limitation period imposed by Title VII for the filing of charges is "jurisdictional". This contention is based on the fact that Title VII in creating a new right also, as part of the same statute, imposed the ninety day limitation on the filing of charges (Res. Br. pp. 17-18).

In our main brief (pp. 28-29) we showed that this is the same argument as was rejected by this Court in *Burnett* v. *New York Central RR.*, 380 U.S. 424, 427-428 (1965) and *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 559 (1974).

Likewise, Robbins & Myers (Br. pp. 17-25) views the tolling doctrine as limited to concepts of waiver and equitable estoppel. While it is true that *Burnett* and *American Pipe* held that, where appropriate, the equitable doctrine of tolling would be applied, tolling principles are not limited to waiver and estoppel.

This Court has held that tolling may serve a variety of different purposes and has refused to decide the applicability of tolling on the basis of technical rules such as those urged by Robbins & Myers (Res. Br. pp. 13-31). In *Minnesota Mining* v. *N. J. Wood Co.*, 381 U.S. 311 (1965) a statutory provision in the Clayton Act tolled the running of the statute of limitations against private litigants during the pendency of civil or criminal suits by the government. This Court held that the running of the statute should also be tolled during the administrative proceedings by the Federal Trade Commission. The Court reached this conclusion because to so hold served the congressional intent to use tolling as a device to make available to private litigants the development of evidence and legal theories by the government. Although this Court stated that "the record of the 1914 legislative proceedings reveals an almost complete absence of discussion on the tolling problem" (381 U.S. at p. 320) and that "the precise language * * * does not clearly encompass Commission proceedings" (381 U.S. at p. 321), the Court adopted the tolling principle which it believed effectuated the congressional purpose.

This Court in the *Minnesota Mining* case did not apply the rule of expressio unius est exclusio alterius on which Robbins & Myers relies (Res. Br. p. 11). Nor was this Court concerned with the fact that the FTC proceedings were independent and alternate to the suit of the private litigants and that the private litigants could have instituted their own suit at any time without regard to whether the FTC proceedings had been begun, were in progress or had been completed. Thus tolling there did not depend on whether there were separate alternate remedies, a test relied upon by Robbins & Myers (Res. Br. pp. 13-16).

Rather in the *Minnesota Mining* case this Court deemed controlling the fact that only by tolling during administrative proceedings by the Federal Trade Commission would the policy of enabling private litigants to have their evidence gathered for them by the government be served. As in *Burnett* v. *New York Central R.R.*, 380 U.S. 424, 427 (1965), to which this Court referred (381 U.S. at p. 321) and upon which we relied in our main brief (pp. 27-29, 41, 44), "the pivotal question for determination" was

> "'[W]hether congressional purpose is effectuated by tolling the statute of limitations in given circumstances?' In order to determine that intent, we must examine 'the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act' *Ibid.*" 381 U.S. at p. 321.

We developed fully in our main brief (pp. 27-41), and will not repeat here the basis for concluding that the intent of Congress to promote to the fullest extent the effectuation of non-discrimination by voluntary agreement and conciliation can only be served by tolling the limitations provisions of Title VII during pendency of properly invoked grievance-arbitration procedures.

Central to our tolling argument is our view that the test is whether tolling is essential to facilitate settlement of discrimination by the procedures of collective bargaining and grievance and arbitration. In judging whether tolling furthers this congressional purpose, consideration of whether remedies are concurrent and alternative is immaterial. The proper focus is on the effect of tolling or not tolling on the achievement of non-discrimination through methods of private self help. Robbins & Myers has, in its brief (pp. 20-31), taken issue with the factual basis of our presentation of the manner in which tolling during the pendency of grievance-arbitration procedures furthers the purpose of Title VII. Robbins & Myers, as we shall show hereinafter, is not accurate with respect to the manner in which the grievance-arbitration procedures function.

A. The Economic Power of a Union Representing All Employees in the Unit in Support of a Grievance Processed Through a Collectively Bargained Grievance-Arbitration Procedure Is Often More Effective Than Administrative or Judicial Proceedings

Where an employee elects to pursue a remedy for discrimination violative of Title VII, by asking his or her duly recognized collective bargaining representative to represent him or her by processing a grievance on his or her behalf, the employee is resorting to a procedure which has a history of success unparallelled by judicial or administrative proceedings. Before correcting inaccurate conceptions of the grievance arbitration procedure appearing in respondent's brief (pp. 20-25), we wish to stress that any employee who has

doubts as to whether the type of discrimination suffered will be attacked by the union, can, of course, ignore the union and go directly to the EEOC. Similarly, any employee who asks the union to handle the discrimination grievance may, at any time, irrespective of the stage which the grievance has reached, including a final arbitration award, go to the EEOC, assuming only that he or she has not lost his or her right by a failure to toll the limitations period.

Historically, the grievance-arbitration machinery established by collective bargaining agreements has supplied a relatively speedy, cheap and effective remedy to employees alleging an unfair discharge. Studies of the arbitration of discharge cases show that during the years 1942-1956, arbitrators found the discharge improper in approximately 58 per cent of the cases.[1] The majority of employees who were found to have been improperly discharged were reinstated by their employers and made good on their jobs. A study in 1957 of 753 awards issued 1950-1955 finding improper discharge, showed that 90 per cent of the employees were reinstated, and a year later 70 per cent were still working.[2] Another study in 1971 of 53 employees showed that only 5 did not return, only 3 were discharged a second time, and management rated the

[1] 61% from 1942-1951 and 54% from 1951-1956. Arbitration Awards in Discharge Cases, 28 LA 930 (1957); Holly, "The Arbitration of Discharge Cases: A Case Study", Critical Issues in Labor Arbitration, Proceedings of the Tenth Annual Meeting, National Academy of Arbitrators (Bureau of National Affairs, Washington, D. C. 1957) p. 5.

[2] Ross, "The Arbitration of Discharge Cases: What Happens After Reinstatement," Critical Issues in Labor Arbitration, op. cit., pp. 21-58.

subsequent performance of the reinstated employee as good in 60 per cent of the cases.[3]

These figures are to be contrasted with the results achieved by the EEOC and NLRB. A computer print out prepared by EEOC for Professor A. W. Blumrosen, Rutgers Law School, showed that for fiscal year 1975, EEOC dismissed 15,799 charges of discharge alleging race discrimination and negotiated "successful settlements" of only 590 charges alleging discharge because of race. In 11,619 of charges of discharge for race the EEOC found no cause.

The Government Accounting Office study of EEOC shows that of 98,135 charge resolutions July 1, 1972 to March 31, 1975, only 10.9 per cent were reported as cause findings resulting in successful negotiated settlements.[4] How many of these "successful settlements" involved hiring or reinstatement and how many resulted in permanent employment is not disclosed. We cited in our main brief, p. 33 fn. 27, a study made of the NLRB's New England regional office from July 1, 1962 to July 1, 1964, showing that of 194 employees whom the NLRB found had been unlawfully discharged, only 85 actually returned to work and only 25 kept their jobs.[5] We know of no comparable study

[3] McDermott and Newhams, Discharge-Reinstatement: What Happens Thereafter, 24 Ind. & Lab. Rel. Rev. 526, 537 (1971).

[4] Government Accounting Office Report on EEOC titled "EEOC Has Made Limited Progress in Eliminating Employment Discrimination", reprinted BNA's Daily Law Report No. 191, p. D-1, at p. D-4, September 10, 1976.

[5] Summary of Findings of a Study of Reinstatement Under the National Labor Relations Act, printed Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor of House of Representatives, 90th Cong., 1st Sess., on H.R. 11725, pp. 3-12 (GPO 1968).

of arbitration cases involving discrimination allegedly violative of Title VII. However, Professor Meltzer[6] offers as a "plausible hypothesis" for the relatively few reported cases in which arbitration awards have been challenged in Title VII proceedings

> "that arbitrators have, on the whole done a good job of finding employment discrimination when it existed or, at least, of convincing grievants, their lawyers, and the EEOC that claimed discrimination did not exist or could not be proved. That hypothesis, if validated, would suggest that arbitrators have risen above the institutional limitations I have emphasized and have by their integrity and craftsmanship achieved a pleasing kind of finality—finality without compulsion of law. Perhaps the prospect of an independent judicial check has contributed to that result by making all participants in arbitration more sensitive both to the special problems of grievances that overlap with Title VII and to the importance of the goal of that Title. In any event, * * * the grievance-arbitration process is likely to remain an important weapon against employment discrimination, and arbitrators are likely to continue to play an important role in advancing the national goal of equal employment opportunity."

The relative speed of grievance-arbitration procedures as compared with administrative and judicial proceedings is equally striking. The time specifications in the collective bargaining agreement between IUE and Robbins & Myers, under which Guy processed her grievance, are typical. Step 1 specifies that after an employee presents a grievance the foreman must

[6] Meltzer, "Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination," 39 Univ. of Chic. Law Rev. 30, 50 (1971).

answer within 24 hours. If the answer is unsatisfactory the steward then presents a written grievance which must be answered in writing by the foreman the following work day. Unless appealed to the Second Step within 4 work days, the grievance is considered as settled. At Step 2 a meeting between the General Foreman and union representatives must be held within one week after the appeal from Step 1. If not settled in 24 hours after the meeting, the grievance must be appealed within 4 days. At the Third Step the Company must give an answer within 10 work days. After the final decision in Step 3, the Union has 10 days within which to invoke arbitration (App. 35a-38a). The maximum time between the grievance and invoking of arbitration is 31 days. Guy was discharged October 25, 1971 (App. 17a). The Company's final answer at Step 3 was dated November 18, 1971 (App. 17a, 18a-19a), a total elapsed time from the discharge to third step answer of 21 days.

Contrary to respondent (Br., pp. 20-23), more than 90 per cent of collective bargaining agreements contain similar time limitations.[7]

Where the grievance goes to arbitration a longer period is involved. The average elapsed time from grievance date to award date for 1971-1972 was 8.5 months.[8]

The EEOC has estimated that the average time to process a charge is about 25 months.[9] As of June 30,

[7] See Bureau of National Affairs, Collective Bargaining Negotiations and Contracts, Basic Patterns of Union Contracts, 8th Ed., 1975, pp. 32-33.

[8] Davis and Pati, "Elapsed Time Patterns in Labor Grievance Arbitration: 1942-1972," 29 ARB Journ. 15, 21 (March 1974).

[9] Government Accounting Office Report, *op. cit.*, at p. D-3.

1975, EEOC's backlog of open charges totalled 126,340 charges, some of which date back to 1968. The GAO study [10] summarized as follows the charges pending in 1975 to show the length of time which charging parties have had to wait for their charges to be resolved:

"Fiscal year in which charge was filed	Number of open charges
1968	2,213
1969	3,260
1970	4,245
1971	5,917
1972	8,114
1973	18,550
1974	30,812
1975	46,919
Unspecified	6,310
Total	126,340 "

The availability of the grievance-arbitration machinery, with the union presenting and supporting the grievance, has other advantages. First hand familiarity of union representatives with employer practices over the years often results in the availability of evidence to support the grievance, which an outside government investigator might never, or only belatedly, discover. The tradition of the union membership in upholding the union side of the collective bargaining agreement by enforcing strict employer obedience to the spirit as well as the letter of its substantive terms, observance of time limitations, disclosure of relevant data and compliance with awards, places the grievant in a position of employee support in the shop, which cannot be obtained by any other procedure to remedy discrimination.

[10] *Id.*, p. D-3.

Congressional intent to promote resolution of discrimination charges by solutions voluntarily devised by the affected parties would be defeated if this best of all voluntary methods must be impeded by denial of tolling, even when all parties desire to proceed with the grievance and arbitration procedures without first resorting to EEOC.

B. Employers Have a Stake in Resolution of Discrimination Issues Through the Grievance-Arbitration Procedures

In recent months a number of management spokesmen [11] have joined with union [12] and government re-

[11] Robert E. Jackson, labor counsel for St. Regis Paper Company, speaking at the Federal Bar Association's First National Conference on Equal Employment and Collective Bargaining, suggested that by encouraging an employee to grieve and pursue arbitration, the employer will become aware of "what is going on in the shop" and will have the opportunity to correct any discriminatory practices of its managers on its own, "without the participation of outsiders, such as EEOC." In addition, Jackson said, the costs to the employer will be less and it will get a decision more quickly by using arbitration. He stated that even if the grievant loses and proceeds to litigation, it is likely that any court would uphold the arbitral decision if the four standards set forth by the Supreme Court in *Gardner-Denver* have been met. Bureau of National Affairs, Daily Labor Report, No. 112, p. A-12, A-13 (June 9, 1976).

Lee C. Shaw, Chicago labor counsel for many employers, speaking to the annual meeting of the National Academy of Arbitrators, said "I do not think it is practical to separate the problems involved in the private arbitration of discrimination cases and the future of private labor arbitration. The sheer volume of discrimination claims and the imperative need to resolve them as expeditiously as possible requires an analysis of what the private arbitrators can do and should do to help solve these critical social as well as labor problems." Daily Labor Report No. 98, p. E-1 (May 19, 1976).

[12] James Youngdahl, general counsel for the International Woodworkers of America, AFL-CIO, speaking at the Federal Bar As-

presentatives [13] in an effort to assure the continued availability of grievance-arbitration procedures for resolving allegations of discrimination because of race, national origin, religion, color or sex. These management representatives emphasize the advantage in terms of securing solutions that will prove workable by having the problems tackled in a systematic and constructive manner by those familiar with the employer and its work force. In addition they see the number of discrimination cases as so great that they will flood the administrative agencies and courts, with attendant delays, greater cost and unstable employee relations prolonged.

All these considerations support the need for tolling.

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sociation Conference (fn. 11, *supra*) reported on the success of an arrangement in Arkansas between a Woodworkers local and the Weyerhauser Co. in which arbitration has become the primary method of resolving discrimination allegations raised by female and minority-group employees. Although the arrangement has not led to any substantial back pay awards, Youngdahl said that the working conditions for women and minorities had improved since its inception.

Youngdahl contended that the legal profession has ignored "the fact that there is a major inadequacy on the part of judges who hear Title VII cases," and claimed that arbitrators could perhaps do a better job in such cases. Daily Labor Report No. 112, p. A-4 (June 9, 1976). The Amalgamated Clothing Workers, AFL-CIO has likewise adopted a program for use of grievance and arbitration procedures to correct discrimination because of race and sex. Hammerman and Rogoff, How to Live With Title VII: An Opportunity for Unions, 2 Employee Relations Law Journal 19, 21 (1976), which updates the article by the same authors cited in the IUE's main Brief, pp. 20, 24.

[13] Herbert Hammerman, Special Assistant to the Director of Compliance Programs (Industrial Relations, likewise participated in the above mentioned (fn. 11, *supra*) Federal Bar Association Conference and urged the use of grievance-arbitration procedures to resolve discrimination issues. See also the articles authored by Hammerman and Rogoff, fn. 12, *supra* and IUE main brief, pp. 20, 24.

C. Since All Time Limits for Processing of Grievances Depend on the Consent of the Employer, the Employer Can Prevent Long Drawn Out Grievance and Arbitration Procedures

Robbins & Myers, (Br. pp. 20-23) argues to this Court that long delays in the processing of grievances occur and the time for filing of charges under Title VII will fluctuate to the disadvantage of employers. Robbins & Myers is a party to a contract which fixes precisely very short periods of time for both parties in the grievance procedure so that the maximum time between the filing of the grievance and the referral to arbitration is 31 days (App. 35a-36a). Indeed the elapsed time between the discharge of Guy and the completion of the third and last step of the grievance procedure was 24 days (App. 17a-19a). In conjecturing about the possibilities of long-drawn-out grievance and arbitration procedures, Robbins & Myers is raising an issue not present in this case.

Furthermore, the statistics on the prevalence of precise and very short time limits on the steps of the grievance-arbitration procedure, make unlikely any substantial incidence of the problem that Robbins & Myers states will exist if tolling is permitted. And since all time limits depend on the agreement of the employer, by refusing to agree to procedures for grievance and arbitration without short specific time limits, employers have it within their power to prevent this problem from ever arising.

In no sense does the absence of time limits, or the presence of unduly long time limits, operate to deprive an employee of any right to file and process a charge with the EEOC. We have never suggested that either the presence or use of a grievance-arbitration proce-

dure should operate to delay for a minute the filing by any employee of any charge with the EEOC any time the employee desires to file a charge.

D. Guy's Grievance Alleging "Unfair Action" by Robbins & Myers Is Broad Enough to Raise the Issue of Any Departure From Equality, Including Discrimination Because of Race

Guy's grievance made no mention of race but merely protested "unfair action" by discharging her (App. 18a). Robbins & Myers argues (Br. p. 24, fn. 20) that in labor relations an allegation of "unfair action" against an employer "customarily connotes conduct disparaging to an employee because of his status as a union member or supporter." For this proposition, Robbins & Myers cites two cases, one decided in 1908 and the other in 1946. Undoubtedly, the words "unfair action" are broad enough to include any discrimination because of union activity, although the present practice of all informed union representatives is to specify by use of the word union any unequal treatment because of union membership or activity.

It is much more usual to use the words "unfair action" to refer to unequal treatment of employees, such as the application of stricter standards to some employees than to others. Arbitrators enforce uniformity as part of the common law of the shop. This principle is stated by the Elkouris as follows: [14]

> "It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same unless a reasonable basis exists for variations in the assessment of punishment (such as different degree of fault or mitigating or aggravating circumstances affecting some but not all of the employees)." (Footnote omitted)

[14] Elkouri and Elkouri, How Arbitration Works, 3rd Ed. 1974, pp. 643-644.

In proving lack of uniformity, although the evidence may be gathered merely to show that the employer has acted inconsistently, the evidence may well give rise to an inference of preference based on sex or race.

Guy's charge was adequate to bring into the grievance and arbitration procedure all issues of discrimination against Guy because of race.

E. Since Procedural Issues Equally With Substantive Issues Arising in Connection With the Processing of a Grievance Are Properly for Decision by the Arbitrator Unless Expressly Excluded, the Long Delays for Court Proceedings Upon Which Robbins & Myers Relies to Militate Against Tolling Are a Rarity, Except for Employers Who Resist Arbitration

In the *Steel Trilogy* [15] this Court obliterated the lines between substantive and procedural issues and held that both types of issues were properly for decision by the arbitrator in the absence of express language withholding the issue from the arbitrator. In all grievances by employees which could be the basis of Title VII charges, there will be no litigation over arbitrability unless the employer opposed arbitration. With control over litigation about arbitrability entirely within the control of the employer, the employer risks

[15] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593 (1960).

nothing due to the possibility of litigation to enforce arbitration.

Since the *Trilogy* decisions suits to enforce arbitrability have become rare. The concern of Robbins & Myers that long delays while issues of arbitrability are determined will inequitably lengthen the tolling period, posit the extremely rare and unusual situation, and one which the employer can avoid by allowing arbitrability to be determined by the arbitrator.

CONCLUSION

For the reasons stated in our main brief, in this reply brief and in the briefs filed by Guy, the decision of the Court of Appeals should be reversed.

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Nos. 75-1264 and 75-1276

In the Supreme Court of the United States

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INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790, PETITIONER

v.

ROBBINS & MYERS, INC.

DORTHA ALLEN GUY, PETITIONER

v.

ROBBINS & MYERS, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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DORTHA ALLEN GUY, PETITIONER

v.

ROBBINS & MYERS, INC.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether the 1972 amendments to Title VII of the Civil Rights Act of 1964, extending the time within which a charge of discrimination in employment may be filed with the Equal Employment Opportunity Commission (EEOC), apply to a charge

pending before the EEOC when the amendments became effective.

2. Whether the filing of a grievance pursuant to a collective bargaining agreement affects the time within which a charge must be filed with the EEOC.

INTEREST OF THE UNITED STATES

Although Title VII of the Civil Rights Act of 1964 creates private rights of action, both the Department of Justice and the EEOC also have important enforcement responsibilities. The enforcement authority of both agencies is activated by the timely filing of a complaint with the EEOC. 42 U.S.C. (Supp. IV) 2000e–5(f)(1). The issues presented by this case therefore will affect the conditions under which the federal government can respond to complaints concerning discrimination. Moreover, the Court's decision also may affect the utility of grievance procedures established by collective bargaining agreements. This in turn implicates the congressional decision, expressed in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.*, to encourage the establishment and use of peaceful grievance resolution procedures.

STATEMENT

Dortha Allen Guy is a former employee of Robbins & Myers, Inc. On October 25, 1971, during an absence from her employment, Robbins & Myers dismissed Guy (Pet. App. 3a).[1] Two days later a co-worker filed a grievance on Guy's behalf, acting pursuant to a pro-

[1] "Pet. App." refers to the appendices in No. 75–1264.

cedure established by a collective bargaining agreement between the Union[2] and her employer. The grievance stated: "Protest unfair action of Co. for discharge. Ask that she be reinstated with compensation for lost time" (App. 18a). This grievance was processed through the first three steps of the grievance procedures and was formally rejected by the employer on November 18, 1971 (App. 18a–19a; Pet. App. 3a).[3]

On February 10, 1972, 84 days after the employer's formal rejection of her grievance and 108 days after her dismissal, Guy filed a charge with the EEOC. Although the EEOC did not find reasonable cause to believe that Guy's discharge was racially motivated, it issued a notice on November 20, 1973, that she had a right to sue her employer. She brought a timely suit on March 19, 1974, alleging that her dismissal was racially motivated (App. 4a–9a).

On June 12, 1974, the district court dismissed Guy's suit for want of jurisdiction (Pet. App. 20a–24a). The court found that Guy had not filed her charge with the EEOC within 90 days of her discharge, and it held that Guy's resort to the contractual grievance resolution machinery did not extend the time in which

[2] The "Union" refers to the International Union of Electrical, Radio and Machine Workers, AFL–CIO Local 790, petitioner in No. 75–1264.

[3] The collective bargaining agreement provides for four steps of grievance resolution procedures. The first three are conferences (1) between the employee and foreman; (2) between the chief steward and general foreman; (3) between union officers and senior representatives of management. The fourth step is arbitration (App. 35a–36a). Guy did not seek arbitration of her grievance (Pet. App. 3a).

to file the charge with the EEOC. The court of appeals affirmed (Pet. App. 1a–9a). It thought that *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, taken together, indicated that the filing of a contractual grievance could not affect the time in which to complain to the EEOC because statutory remedies and remedies established by grievance procedures are independent. The court also stated that the 90-day period within which to file a charge was "more than a mere statute of limitations"; it was statutorily created as "an integral part of the right and * * * must be strictly followed" (Pet. App. 5a).

The EEOC, participating on appeal as *amicus curiae* in support of Guy, pointed out that the Equal Employment Opportunity Act of 1972, 86 Stat. 105, extended to 180 days the time within which to file a charge. Because Guy's charge was filed 108 days after her dismissal and was pending on March 24, 1972, when the amendments became effective, the EEOC argued that it was timely. The court of appeals thought that it was not "required" to consider this point because it had not been made in the district court (Pet. App. 8a). It considered the argument nevertheless, concluding that Guy's charge was barred because more than 90 days had elapsed between Guy's discharge and March 24, 1972; it reasoned that the 1972 amendments could not "revive" a claim that was "barred and extinguished" prior to their effective date (Pet. App. 8a–9a). Judge Edwards dissented. He would have remanded the case to the district court for

consideration of the effect of the 1972 amendments (*id.* at 9a–12a).

SUMMARY OF ARGUMENT

I

Guy's claim with the EEOC was filed 108 days after her discharge and 84 days after upper management of her employer had decided not to reinstate her. Her claim was being processed by the EEOC on March 24, 1972, when the Equal Employment Opportunity Act of 1972, 86 Stat. 105, extended to 180 days the time within which to file a claim with the EEOC. Therefore, if the 1972 amendments apply to Guy's claim, it was timely.

We submit that the 1972 amendments apply. The ordinary principle is "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary" (*Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 711). The law in effect at the time the lower courts heard this case provided that a claim is timely if filed within 180 days. It is therefore this time limit, not the earlier 90-day limit, that applies to Guy's claim.

The statute and legislative history demonstrate that Congress intended the new time limitations to apply to previously filed claims. Section 14 of the 1972 amendments, 86 Stat. 113, provides that the amendments "shall be applicable with respect to charges pending

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with the Commission on the date of enactment of this Act and all charges filed thereafter." Guy's charge was pending on March 24, 1972, the effective date of the amendments; it had been filed on February 10, 1972, and the EEOC was then processing it. The legislative history indicates that for purposes of Section 14 of the amendments a charge was "pending" before the EEOC if it had been filed prior to the effective date of the amendments. There was no intention that a charge must have been timely under the old 90-day limit as a condition of being "pending" for purposes of the amendments.

Moreover, Guy's claim was timely because it could have been filed after the effective date of the amendments. The one hundred eightieth day after her discharge was April 22, 1972, nearly a month after the amendments became effective. She could have filed a timely charge between March 24 and April 22. That being so, there is no purpose in penalizing her for filing the charge on February 10, which amounts to cutting off her claim under a statute of limitations because the claim was filed *too soon*. See *Love* v. *Pullman Co.*, 404 U.S. 522.

II

Even if the 90-day time limitation applies to Guy's claim, it was timely filed because the 90 days did not begin to run until the contractual grievance resolution procedures had been completed.

A. A grievance filed under a collective bargaining agreement enables an employee to obtain contractual

review of the decision of her immediate supervisor to discharge her. A grievance is a method of obtaining the ruling of higher management on the question whether the employee's discharge was proper. Filing a grievance therefore should suspend the finality of the discharge for purposes of periods of limitations; the decision of the employer as an entity is not complete until the grievance process is complete. An employee claiming discrimination could file a claim at any time before or during the grievance process, because her injury commenced on the day of her discharge. But an employer's decision to discharge an employee is not a unitary act. It has a beginning and an end, and although the *right* to file a claim should arise at the beginning of that process, the *time* to file a claim should run from its completion.

B. The filing of a contractual grievance also should be viewed as an event that "tolls" the statutory time limitation. Statutes of limitations are directed at those who sleep on their rights, not at employees who promptly resort to thoroughly familiar rules of their shop, rules that their employer has implicitly promised will be effective to redress just complaints. The filing of a contractual grievance gives the employer notice of the complaint, allows it to gather evidence to support an eventual legal defense, and affords it an opportunity to reduce its exposure to back pay by reinstating the employee.

Allowing tolling in these circumstances would effectuate the congressional intention to "give the aggrieved person the maximum benefit of the law" (118

Cong. Rec. 7167, 7565 (1972)). It would promote the purposes of this "humane and remedial" Act, without any possibility of prejudice to the employer. *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424, 427. It would encourage cooperation and voluntary compliance, a primary goal of Congress, by supporting resort to private and informal remedies in the first instance. And tolling would also implement the desire of Congress to encourage peaceful resolution of labor disputes through collective bargaining and mutual grievance adjustment. See *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 66. Premature resort to a Title VII claim may well undermine the effectiveness of the grievance mechanism. The two remedies can best be accommodated by allowing an employee a brief time to resort to her contractual rights without potential loss of her statutory rights.

ARGUMENT

Guy's right to an adjudication of the merits of her claim depends upon whether her charge, filed with the EEOC 108 days after her discharge and 84 days after her employer had rejected her contractual grievance, was timely.

The Equal Employment Opportunity Act of 1972 provides that an individual has 180 days to present her complaint to the EEOC. If the 1972 statute applies to Guy's complaint, then it was timely filed. Part I of this brief discusses the application of this statute. If the statute applies, as we argue, it does not matter whether the time for filing began to run upon Guy's

discharge or upon her employer's rejection of her grievance. Part II of this brief then argues that, in any event, the time to file a charge is affected by the filing of a contractual grievance.

I

THE CHARGE FILED WITH THE EEOC WAS TIMELY BECAUSE IT WAS FILED WITHIN 180 DAYS OF THE DISCHARGE

A. COURTS SHOULD GIVE EFFECT TO THE RULE IN FORCE WHEN THE CASE IS DECIDED

Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 104, amending Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. IV) 2000e–5(e), provides that a charge must be filed with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred * * *." This 180-day time limit, effective March 24, 1972, replaced the 90-day time limit that had been contained in former Section 706(d), 42 U.S.C. 2000e–5(d). Guy's charge was filed with the EEOC 108 days after she was fired. If the 180-day limit applies, her charge was timely.

The ordinary "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary" (*Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 711), governs here. The law in effect at the time the district court and court of appeals rendered their decisions provided that a charge

filed within 180 days was timely. We know of no reason why the ordinary principle should not apply to statutes affecting timeliness. Cf. *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314. If the courts should apply the law in effect at the time of their decision even when, as in *Bradley,* it creates entirely new substantive rights, it follows that they should apply the law in effect at the time of their decision when it simply extends the time within which to enforce substantive rights that already exist.[4] The employer's obligation not to discriminate long preceded the 1972 change, and it is not being penalized for conduct that previously was proper. "This is not a case where [the employer's] conduct would have been different if the present rule had been known" (*Chase Securities Corp., supra,* 325 U.S. at 316). Cf. *Usery* v. *Turner Elkhorn Mining Co.,* No. 74–1302, decided July 1, 1976, slip op. 10–15, 20–22.

There are two exceptions to the general rule articulated by *Bradley*: the new rule does not apply where it would result in "manifest injustice" or where such

[4] The court of appeals concluded that the time limitations in Title VII are part of the substantive right itself, and hence are more than procedural statutes of limitations. This Court has rejected the drawing of such a substantive-procedural distinction when only federal statutes are involved. See *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 556–557; *Burnett* v. *New York Central R.R. Co.,* 380 U.S. 424, 426–427. It has indicated that cases drawing such a distinction do so only for purposes of resolving conflicts of laws or deciding state law questions. *Burnett, supra,* 380 U.S. at 427 n. 2; *Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 466–467. But if the court of appeals were correct, and the limitations in Title VII are matters of "substance," then the application of the *Bradley* principle would still be clear, for *Bradley* dealt with a "substantive" right to attorney's fees.

application would violate the intent of the legislature. There would be no "manifest injustice" in applying the new rule here; the employer has not alleged that it was prejudiced in any manner by the fact that the charge with the EEOC was filed 108 days rather than 90 days after Guy's discharge. Here, as in *Bradley,* the suit presents issues of "great national concern," involving the eradication of racial discrimination, and a meritorious claim, in addition to vindicating Guy's own rights, would advance the public's interest in obtaining equal employment opportunity (416 U.S. at 718–719 and n. 19). Moreover, as we show at pages 12–15, *infra,* the legislative history of the 1972 amendments, and the statutory language itself, indicate that Congress intended the new rules to apply to pending cases. The 180-day limitation consequently applies to Guy's charge.[5] See *Davis* v. *Valley Distributing Co.,* 522 F. 2d 827 (C.A. 9), petition for a writ of certiorari pending, No. 75–836.

[5] The court of appeals thought that it was not required to consider these arguments because they were not presented to the district court. This is incorrect. "Defective allegations of jurisdiction may be amended, upon terms, in the trial *or appellate* courts." 28 U.S.C. 1653; emphasis added. This Court has indicated that an appellate court should treat the pleadings as if they had been properly amended, where a formal amendment would serve no useful purpose. See *Mathews* v. *Diaz,* No. 73–1046, decided June 1, 1976, slip op. 6–9; *Willingham* v. *Morgan,* 395 U.S. 402. Just as an appellate court should consider *sua sponte* whether the district court lacks jurisdiction, so too it should consider grounds upon which the district court possessed jurisdiction, whether or not those grounds were presented to the district court. In any event, the court of appeals did decide the question, and it is properly before this Court as one of the questions presented in both petitions for certiorari.

B. THE 1972 AMENDMENTS AND THEIR LEGISLATIVE HISTORY DEMONSTRATE THAT CONGRESS INTENDED TO APPLY THE NEW RULES TO PENDING CASES

Section 14 of the 1972 amendments to Title VII, 86 Stat. 113, provides:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

Guy's charge, which had been filed on February 10, 1972, was being processed by EEOC when the amendments became effective on March 24, 1972. Under Section 14 of the amendments, therefore, the new time limitation contained in Section 706(e) should be applied to her charge.

It could be otherwise only if a charge, untimely on the date it was filed, were not treated as "pending" by the courts, even though it was treated as "pending" by the EEOC. There is no support for such an interpretation. Section 14 applies to all of the 1970 amendments to Section 706, including the changes in the time limitations. If a charge that was out of time on the date it was filed were not "pending" on March 24, 1972, then the provision of Section 14 relating to "pending" charges would be surplusage as to the time limitations, for there could be no "pending" charges to which the extended time limitations of Section 706(e) could apply. In order to avoid depriving part of Section 14 of meaning, then, the Court should interpret that Section as applying to all charges

that were being processed by the EEOC on March 24, 1972, whether or not the charges were timely filed under the previous limitations.

This interpretation of Section 14 is supported by its legislative history. Some of the proposed bills to amend Title VII explicitly provided that the changes to Section 706 were *not* to apply to pending charges. For example, Section 10 of S. 2453, introduced in the first session of the 91st Congress (1969), stated:

> Sections 706 and 710 of the Civil Rights Act of 1964, as amended by this Act, shall not be applicable to charges filed with the Commission prior to the effective date of this Act.

S. 2453, like several other legislative proposals,[6] would have amended Section 706 by granting the EEOC power to issue cease-and-desist orders after holding administrative hearings. Section 10 of S. 2453 was designed to prevent the EEOC from exercising the proposed cease-and-desist powers with respect to preexisting charges, but to apply the remainder of the changes in Section 706 to those charges.[7] The Committee Report recommending passage of S. 2453 so indicated. S. Rep. No. 91-1137, 91st Cong., 2d Sess. 31 (1970):[8]

[6] See S. 2515, 92d Cong., 1st Sess. § 4 (1971); H.R. 1746, 92d Cong., 1st Sess. § 4 (1971); H.R. 6228, 91st Cong., 1st Sess. § 2 (1969).

[7] S. 2453 included the same 180-day filing period as the bill ultimately enacted. S. Rep. No. 91-1137, 91st Cong., 2d Sess. 43 (1970).

[8] In the amended version reported out by the Committee, Section 10 was renumbered as Section 11.

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> This section provides that the amended provisions of section 706 concerning the cease and desist enforcement powers would not apply to charges filed with the Commission prior to the effective date of this act. The amended sections of section 706, particularly 706(a) through (e) and (q)(3) through (w) that concern procedural matters, attorney's fees and civil action remedies would apply to current charges.

The Committee Report on S. 2515, issued during the next Congress, included the same language, indicating that the Senate still desired to apply the new time limitations, but not the proposed cease-and-desist powers, to pre-existing charges. S. Rep. No. 92–415, 92d Cong., 1st Sess. 46 (1971).

The final legislation, however, did not contain cease-and-desist authority. Instead, it authorized the EEOC to bring civil actions in federal court. See S. 2515, 118 Cong. Rec. 4944 (1972); H.R. 1746, 117 Cong. Rec. 32111 (1971). Section 14 of S. 2515 as passed by the Senate provided that the amendments to Section 706 shall be applicable to all charges pending before the EEOC. This language complied with the Senate's previously expressed intent to apply all changes, except those concerning cease-and-desist powers, to previously filed charges. Because the bill finally passed contained no cease-and-desist powers, the new Section 14 was designed to apply to previously filed charges all the changes to Section 706. See also 118 Cong. Rec. 4816 (1972).

The Conference report also demonstrates that this is the proper construction of Section 14. It states

(S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. 21 (1972)): "The Senate amendment provided that the new enforcement provisions of section 706 apply to charges pending before the Commission on enactment. The House bill was silent. The House receded." Congress therefore adopted the Senate's provision, and with it the Senate's understanding of its effects. The section-by-section analysis, considered and approved by both houses (118 Cong. Rec. 7166–7169, 7170, 7563–7567, 7572–7573 (1972)), stated that the extension of the limitations periods should be interpreted "so as to give the aggrieved person the maximum benefit of the law" (*id.* at 7167, 7565), and that Section 14 "would apply to charges *filed* with the Commission prior to the effective date of this Act" (*id.* at 7169, 7567; emphsis added). In light of this congressional preference, there can be little doubt that the 180-day period applies to Guy's claim.

C. THE 180-DAY PERIOD APPLIES TO ALL PREVIOUSLY FILED CLAIMS THAT COULD HAVE BEEN FILED IN A TIMELY MANNER AFTER ENACTMENT OF THE 1972 AMENDMENTS

The court of appeals suggested that Guy's claim was untimely because it was already barred when it was filed. We believe that this suggestion is completely and correctly answered by our argument above, that the claim was "pending" when the 1972 amendments became effective, and so is governed by the new time periods specified in those amendments. Even if that is not so, however, Guy's claim still is timely. She was fired on October 25, 1971. The one hundred eightieth day from her discharge was April

22, 1972. If she had not filed a claim when she did, but instead had filed her claim between March 24, 1972 (when the amendments became effective) and April 22, 1972 (when 180 days from her discharge expired), it undoubtedly would have been timely. Similarly, she could have filed a second claim between March 24 and April 22, which would have been timely. The court of appeals has effectively penalized Guy for filing her claim *too soon,* an ironic result for a case dealing with a statute of limitations.

The Court considered a similar trap for the unwary in *Love* v. *Pullman Co.,* 404 U.S. 522. Section 706(b) of Title VII, 42 U.S.C 2000e–5(b), provided that a charge could not be filed with the EEOC until 60 days after it had been filed with a state or local agency, or until the termination of state or local proceedings, whichever came first.[9] The EEOC adopted the practice of accepting complaints and referring them to state or local agencies; it later would "file" the accepted charges at the appropriate time. This Court upheld the EEOC's procedures.[10] It concluded that to require the filing of a second charge with the EEOC "would serve no purpose other than the creation of an additional procedural technicality. Such technicalities are

[9] This provision is now part of the amended Section 706(c), 42 U.S.C. (Supp. IV) 2000e–5(c).

[10] The Conference Committee's analysis of the 1972 amendments expressed Congress' agreement with *Love* v. *Pullman Co.* and the EEOC's practice. See S. Conf. Rep. No. 92–681, *supra,* at 17. See also 118 Cong. Rec. 7167 (Senate), 7564 (House) (1972). This approval, we submit, is an implicit congressional rejection of any duplicate filing requirement to preserve Title VII rights.

particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (404 U.S. at 526–527). A single filing with the EEOC was enough to give the notice contemplated by the statute, the Court held.

The same principle applies here. There is no reason to penalize Guy for having filed her complaint too soon. Nor is there any reason to require her, as a condition of receiving the benefits of the amendments, to have filed a second complaint between March 24 and April 22. The jurisdiction of the district court therefore should not turn on the absence of such a filing. Cf. *Shapiro* v. *United States,* 335 U.S. 1, 31; *Markham* v. *Cabell,* 326 U.S. 404, 409.

II

THE USE OF A CONTRACTUAL GRIEVANCE RESOLUTION PROCEDURE AFFECTS THE TIME WITHIN WHICH TO FILE A COMPLAINT WITH THE EEOC

Guy's complaint was filed with the EEOC 84 days after her employer's managing officials rejected the grievance filed under the collective bargaining agreement between her employer and the Union. If the time to file a complaint with the EEOC is calculated from that date, Guy's complaint was timely, whatever time limitation may be applied. We believe that three arguments support the conclusion that management's rejection of Guy's grievance is the proper date from which to calculate the time: first, a grievance under a collective bargaining agreement is a way of obtaining the

ruling of higher management upon the decisions of other officials of the employer, and the employee's right to obtain such a ruling suspends the "finality" of her discharge; second, the failure of management to rehire a black employee (for example), when a white employee would have been rehired, may itself be an act of racial discrimination; and third, the filing of a grievance may "toll" the period of limitations under Section 706(e). The first and second arguments are closely related and will be discussed together.

A. AN EMPLOYEE'S DISCHARGE IS NOT FINAL UNTIL SHE HAS RECEIVED THE BENEFIT OF A CONTRACTUAL RIGHT TO ITS REVIEW

An employee who is fired for racial reasons has a number of parallel and overlapping remedies available. The employee can bring an action under 42 U.S.C. 1981 (see *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459–460); the employee can file a claim of racial discrimination under Title VII; the employee can pursue remedies that may be created by her contract of employment and any collective bargaining agreement between her union and her employer. All of these remedies are available, and resort to one of them does not preclude resort to any other. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36. The court of appeals' analysis stopped at this point; it reasoned that because the remedies overlap, resort to any of them cannot affect the time within which to resort to another.

That is not necessarily so. Although invoking Title VII remedies does not affect the time within which to

file a Section 1981 suit (*Johnson, supra*), the effects of resorting to each remedy deserve separate analysis. The Court's decision in *Johnson* was influenced by a number of factors that do not apply to this case. In *Johnson* the Court was dealing with a state statute of limitations and state tolling rules; the statutes and timeliness rules here are entirely federal. In *Johnson* no underlying federal policy militated in favor of tolling; there is such an underlying policy here (see pages 27–28, *infra*). In *Johnson* the Court indicated that the filing of a Title VII claim, which was followed by extended administrative proceedings, was not sufficient to give the potential defendant in a Section 1981 suit notice of the potential claim for relief under the latter statute; that is not so here. The holding of *Johnson* therefore does not automatically apply to the instant case.

Perhaps the most fundamental difference between *Johnson* and this case, however, stems from the nature of a contractual grievance. A collective bargaining agreement is part of our system of "industrial self-government" (*United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580). The rights and obligations established by such an agreement become the law of the shop, and they are an integral part of the rules that govern the employment relationship. Although the employer's foremen usually can fire an individual employee such as Guy, the question whether that discharge is proper depends in large measure upon the provisions of the collective bargaining agreement. The collective bargaining agreement

between the Union and Robbins & Myers provided that Robbins & Myers would discharge an employee only for "cause." It also provided that the employer would not discriminate on account of race or sex (App. 35a).

The grievance resolution procedures of a collective bargaining agreement also are part of the employment rights possessed by an employee. The employment relationship is not fully severed—that is, the employee is not without contractual rights against her employer—until the employee has taken advantage of such grievance resolution procedures as she and her bargaining representative may deem appropriate. In most collective bargaining agreements, of which the agreement involved in this case is an example, the initial steps of the grievance resolution procedures enable the employee and the union to obtain review by higher management of decisions made by the employee's immediate supervisor (see App. 35a–37a). The collective bargaining agreement involved in this case provided that a grievance shall be resolved in a meeting between the employee and her foreman within 24 hours of a grievance. If that answer was unsatisfactory, the employee had a right to receive a reply in writing within the next working day. The employee then had four working days to seek review by the general foreman and the line foreman. They were required to respond within 24 hours, and if their answer were unsatisfactory, the employee had an additional four working days to seek review by "representatives of management" (App. 36a). These representatives had 10 days to give written answers to the grievance.

At each step, higher representatives of the employer were called upon to review decisions by lower-ranking representatives of the employer. The final decision of the employer as an entity was made only after the third step of the grievance resolution process.

In a very real sense, therefore, Guy's discharge was not final until the "representatives of management" of Robbins & Myers had decided that they would support the decision of her foreman to fire her. Use of the grievance resolution process is not an "appeal" of a "final" decision, but is a method of obtaining the judgment of higher management on whether the employee should be retained. This does not mean that Guy was required to "exhaust" her contractual remedies. She suffered loss at the hands of her employer, and may have been a victim of discrimination, the moment she was fired. She therefore could have brought suit or filed a Title VII claim without further delay. But her resort to the contractual grievance resolution process suspended the finality of her separation from Robbins & Myers until higher management passed upon the decision of her foreman.[11]

Moreover, the processing of an employee's grievance can itself entail employment discrimination. Guy's complaint in the district court alleged (App. 7a) that at least one white employee of Robbins &

[11] In some respects the process resembles the filing of a petition for rehearing after a litigant loses a case in the court of appeals. The losing party may file a petition for certiorari immediately; instead, the losing party may file a petition for rehearing. The time to seek certiorari in this Court then does not begin to run until the court of appeals has passed upon the petition for rehearing.

Myers, fired under similar circumstances, had been reinstated during the grievance process. Because specific intent to discriminate is not a requirement under Title VII (*Griggs* v. *Duke Power Co.*, 401 U.S. 424), the act of higher management in not rectifying discrimination practiced by Guy's foreman would be a separate act of discrimination. Guy would have suffered twice: once when she was fired because of her race, and once when she was not reinstated. *Jurinko* v. *Wiegand Co.*, 477 F. 2d 1038 (C.A. 3); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811, 827 (C.A. 7). It would make little sense to require separate Title VII claims for each occurrence. It seems most appropriate, therefore, to treat the act of discrimination as a continuing one, commencing with the foreman's decision and continuing until upper management has endorsed that discharge.[12] The aggrieved employee could file a claim of discrimination at any time during this process, because the discrimination commenced with the foreman's decision. But for purposes of the time requirements of Title VII, the employee's time should run from the decision of higher management as well. In sum, our submission is that the decision of an employer to discharge an employee is not a unitary act. It has a beginning and an end, as different officials of management make decisions. The time to file a claim under Title VII should run from the end of the proc-

[12] Cf. *Egelston* v. *State University College at Geneseo*, C.A. 2, No. 76-7047, decided June 7, 1976 (time to file charge with EEOC does not begin to run until a professor's reinstatement is precluded by filling the post with another appointment); *Johnson* v. *University of Pittsburgh*, 359 F. Supp. 1002 (W.D. Pa.).

ess, even though the right to file commences at the beginning.[13]

B. USE OF CONTRACTUAL GRIEVANCE PROCEDURES TOLLS THE RUNNING OF TITLE VII'S STATUTE OF LIMITATIONS

With the exception of the court in this case, every court of appeals that has considered the matter has held that the time to file a charge with the EEOC is tolled by resort to contractual grievance resolution machinery. *Culpepper* v. *Reynolds Metals Co.*, 421 F. 2d 888 (C.A. 5); *Malone* v. *North American Rockwell Corp.*, 457 F. 2d 779 (C.A. 9); *Moore* v. *Sunbeam Corp.*, 459 F. 2d 811 (C.A. 7); *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 538 (S.D. W.Va.), affirmed, 474 F. 2d 1342 (C.A. 4); *Sanchez* v. *Trans World Airlines, Inc.*, 499 F. 2d 1107 (C.A. 10).[14] The commentators have endorsed this re-

[13] There is no reason to believe that this would result in substantial delay in filing claims or otherwise frustrate the intent of Congress. It is in the interest of management to process grievances with expedition, in order to minimize the exposure to a requirement that the employer pay for work not performed. Most collective bargaining agreements reinforce this incentive with explicit time requirements. The collective bargaining agreement here is no exception; it allowed 24 hours for the foreman's decision, four days to protest, 24 hours for the general foreman to decide, four more days to seek the judgment of higher management, and 10 days for them to decide. The grievance resolution process in this case took only 22 days. If the Union had elected to resort to arbitration, that choice would have had to be made in ten more days, and the collective bargaining agreement called for expeditious decision (App. 37a).

[14] See also *Dartt* v. *Shell Oil Co.*, C.A. 10, No. 75-1277, decided July 22, 1976, which holds that a complaint to the Department of Labor tolls the time to file a civil suit under the Age Discrimination in Employment Act, 29 U.S.C. 626(d)(1), which contains time limitations modeled on Title VII.

sult.[15] In our view, the *Culpepper* court persuasively articulated three arguments in support of a tolling effect. The court emphasized that statutes of limitations are directed at those who sleep on their rights and not at employees who are "thoroughly familiar with the rules of the shop" and elect to rely on them in the first instance (421 F. 2d at 891). It thought that the possibility of a restrictive reading of periods of limitation should be subordinated to the interests of justice and the purposes of a "humane and remedial Act" (id. at 892). And it concluded that tolling of the limitations period would encourage resort to the grievance process, a result that it believed was supported by the national labor policy. We discuss each point in turn.

When Congress creates both a substantive right and a period of limitations, it announces two conflicting principles. The substantive right indicates that Congress intended to eradicate racial discrimination in employment. The period of limitations indicates that Congress desired to induce employees to vindicate their rights expeditiously. But other federal policies, too, are involved, and this Court has often held that consideration of such additional policies may justify tolling a period of limitations. The controlling question "is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett* v. *New York Central R.R. Co.*,

[15] See, *e.g.*, Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. Chi. L. Rev. 30, 48–50 (1971).

380 U.S. 424, 427. See also *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 555–556.[16]

The usual purpose of a period of limitations is to prevent an aggrieved party from sleeping on his rights, and to prevent unfairness to defendants that may be caused by the revival of stale claims. See *Burnett, supra*, 380 U.S. at 428; *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348–349; *American Pipe, supra*, 414 U.S. at 554–555. An additional consideration supports a requirement of prompt action upon Title VII claims. Because an employer may be liable for back pay for a racially-motivated discharge, prompt notice may enable the employer to reinstate the employee and so to reduce its liability. Neither purpose is frustrated by tolling the limitations period while contractual grievance resolution procedures are in use. Guy's grievance notified Robbins & Myers that she was protesting her discharge. The claim was not "stale" but instead was filed two days after the discharge, and the grievance was

[16] The court of appeals relied on the fact that the statute of limitations was part of Title VII itself, stating that it was therefore "an integral part of the right" (Pet. App. 5a) that must be "strictly followed" (*ibid.*). The court cited (Pet. App. 6a) *The Harrisburg* has been relied on, as here, to distinguish between statutes of limitations that are "substantive" and therefore immune from extension, and those which are merely "procedural." This Court now has held, however, that this distinction has no role to play outside the field of conflict of laws. See note 4, page 10, *supra*. "The proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe*, *supra*, 414 U.S. at 557–558.

processed within 22 days. The resort to the grievance machinery gave Robbins & Myers ample opportunity to reinstate Guy and protect itself against substantial liability for back pay. Moreover, because the employer's decision rejecting the grievance relied upon a non-racial justification,[17] the grievance process gave the employer an opportunity to discover the evidence and explore the justifications for its action. This enabled it to prepare the central features of its defense in a Title VII action. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802. The grievance process therefore provided the employer with the "essential information necessary to determine both the subject matter and size of the prospective litigation" (*American Pipe, supra*, 414 U.S. at 555).

On the other hand, there is little reason to penalize an employee for resort to the familiar rules of the shop, rules that her employer has implicitly promised will be effective to redress just grievances. Title VII relies upon unassisted laymen to take the first steps in the presentation of claims of discrimination, and it was entirely natural for Guy first to turn to her contractual remedies. Congress has expressed an intention to "give the aggrieved person the maximum benefit of the law" (118 Cong. Rec. 7167, 7565 (1972)). This intention cannot be carried out unless the period of limitations is tolled by resort to contractual remedies. As in *Burnett, supra,* 380 U.S. at 427, tolling of the limitations period helps to effectuate the purposes

[17] Upper management justified the discharge on the basis of a violation of sick leave regulations (App. 18a–19a).

of a "humane and remedial" Act, without any possibility of prejudice to the employer.

Indeed, congressional policy would be well served by tolling in these circumstances. When enacting Title VII, Congress established "[c]ooperation and voluntary compliance * * * as the preferred means" of eradicating employment discrimination. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44. Title VII implements part of this policy by giving state and local employment agencies, and the EEOC itself, an opportunity to settle individual cases "through conference, conciliation, and persuasion before the aggrieved party [is] permitted to file a lawsuit" (*ibid.*).[18] Tolling Title VII's limitations periods during contractual

[18] Section 706(c), 42 U.S.C. (Supp. IV) 2000e–5(c), provides that a charge shall be filed initially with a state or local agency that handles discrimination cases, if there is one. This gives the State an opportunity to consider discrimination complaints arising within its jurisdiction and to seek to eliminate discrimination without federal intervention. EEOC cannot commence proceedings until the state or local agency has completed its proceedings, or until 60 days have passed after filing with the state or local agency, whichever comes first. An employee who files a claim with a state or local agency receives the benefit of an extended period of limitations. Section 706(e), 42 U.S.C. (Supp. IV) 2000e–5(e), provides that a claimant who has sought relief from a state or local agency can file a claim with the EEOC until 300 days after the alleged unlawful employment practice, or until 30 days after receiving notice of the termination of the state or local proceedings, whichever is earlier.

The extension of time created by resort to state or local agencies demonstrates that Congress does not insist upon strict observance of the 90 or 180-day limitations periods contained in Section 706(e). Just as resort to a state or local agency may obviate the need to file a charge with the EEOC, so resort to contractual grievance procedures may resolve a complaint short of federal inter-

grievance resolution also would contribute significantly to "[c]ooperation and voluntary compliance" without the need to invoke formal legal machinery, and without the need to resort to potentially wasteful duplicate remedies.

Another congressional policy, stated in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151, is that the United States shall seek to ameliorate the detrimental economic effects of labor disputes by "encouraging the practice and procedure of collective bargaining." This congressional preference, the Court has held, includes a preference for peaceful resolution of disputes through grievance resolution and arbitration. See *Emporium Capwell Co.* v. *Western Addition Community Organization,* 420 U.S. 50, 66; *Buffalo Forge Co.* v. *United Steelworkers of America,* No. 75–339, decided July 6, 1976, slip op. 14; *Gateway Coal Co.* v. *United Mine Workers of America,* 414 U.S. 368; *United Steelworkers of America* v. *American Manufacturing Co.,* 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra; United Steelworkers of America* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593. "[A]rbitration is a substitute for industrial strife" (*Warrior & Gulf, supra,* 363 U.S. at 578), and the "federal policy favoring arbitration of labor disputes is firmly grounded in congressional command" (*Gateway Coal Co., supra,* 414 U.S. at 377). The congressional policy

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vention. This suggests that, if Congress had considered the problem, it would explicitly have provided that a contractual grievance tolls the time in which to file a charge with the EEOC. See *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 320–322.

favors peaceful resolution of racial disputes no less than of others. *Emporium Capwell Co., supra.*

Alexander recognized that although Title VII and grievance procedures are independent in the sense that resort to one does not bar resort to the other, they are also complementary. "[C]onsideration of the claim by both forums may promote the policies underlying each" (415 U.S. at 50–51). The intent of Congress in enacting Title VII was to "supplement, rather than supplant, existing laws and institutions relating to employment discrimination" (*id.* at 48–49). Proper accommodation of the two procedures therefore requires a rule under which an employee will have a fair opportunity to utilize each remedy, and in which neither remedy will hinder resort to the other.

For many of the reasons discussed at pages 31–35 of the Union's brief, we submit that this accommodation of the two remedies is best accomplished by allowing an employee to resort first to contractual remedies, without suffering any diminution of ability to file a timely Title VII claim if these remedies are unavailing. The employee may wish to be in a position to compromise with her employer, which is more difficult once the Title VII process has begun. See 29 C.F.R. 1601.9. She may wish to encourage resolution of the dispute by promising not to pursue further remedies if her grievance is satisfactorily resolved. The employer may be more forthcoming if it believes that informal resolution is possible. And, as the Union points out (Br. 33), resolution of the dispute may be more likely if the employee is not required to accuse

her employer in public of "racism." These factors, and others, militate in favor of resort to contractual grievance machinery in the first instance. We submit that contractual grievance procedures and Title VII remedies can coexist, and each can be used to the full extent contemplated by Congress, only if initial resort to contractual remedies tolls the time to file a Title VII claim.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court with instructions to reinstate the complaint.

Respectfully submitted.

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Nos. 75-1264 and 75-1276

IN THE

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OCTOBER TERM, 1976

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO LOCAL 790,
Petitioner
v.
ROBBINS & MYERS, INC.

DORTHA ALLEN GUY,
Petitioner
v.
ROBBINS & MYERS, INC.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 42(2) of the Rules of Court, all parties to the case have consented in writing to the filing of this brief and participation of the Equal Employment Advisory Council (hereinafter referred to as EEAC) as *amicus* in this case. EEAC is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its membership includes a broad spectrum of employers, both organized and unorganized, from throughout the United States, and including individual employers as well as trade and industry associations.

The principal goal of the EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. A substantial number of EEAC's members, or their constituents, have collective bargaining agreements covering hundreds of thousands of employees throughout the country including substantial numbers of persons who are otherwise protected under Title VII of the Civil Rights Act. As such, the members of EEAC have a direct interest in the issues presented for the Court's consideration in this case, both as to the retrospective application of the 1972 amendments and the request for permitting the tolling of the time limits for the filing of discrimination claims with the Equal Employment Opportunity Commission by the mere filing of a grievance under a collective bargaining agreement.

EEAC urges the Court to bring about greater stability in the procedures to be followed under Title VII so that persons affected thereunder, whether they

be complainant or respondent, will know with certainty what the law requires of them in the protection of their rights.

STATEMENT OF THE CASE

The facts as set forth in the briefs of the parties to this case are sufficient for the *amicus* to present its position as a friend of the Court on the appeal. Several key points, however, should be fully stressed. Petitioner Guy's claim of discrimination, on the merits, was found wanting by the Equal Employment Opportunity Commission, which investigated it fully, and found no cause for discrimination notwithstanding its untimeliness. Unlike her grievance which failed to allege discriminatory treatment, she charged the Company for the first time with discrimination on grounds of race and sex before the EEOC.

Further Petitioner Guy was a union steward and even though a grievance was filed over the alleged "unfair action" of the Company, it was *not* taken further to an impartial arbitrator by the Petitioner IUE herein after being denied at the top step of the grievance procedure before arbitration. No claim is made that she was unaware prior to the expiration of the filing period with the EEOC that the union had abandoned her cause. Her subsequent court action initially sued the Union for breach of the duty of fair representation.

SUMMARY OF ARGUMENT

This case is before the Court as a result of the interaction of several earlier decisions that afford Petitioner an opportunity to endeavor to maintain an action in the Federal courts even though she has failed to comply with the Title VII statutory juris-

dictional time limits for filing charges with the Equal Employment Opportunity Commission expressly recognized by this Court on three separate occasions since 1973.

Perhaps aware that these rulings are fatal to her contention, Petitioner initially argues that the 1972 amendments to Title VII should be construed in a retrospective manner so as to revive her untimely filed claim which had previously been extinguished by operation of law. The legislative history of the amendments fail to support her contention that Congress intended to resurrect such barred claims. The text of a Justice Department letter referred to on the floor of Congress and published as Special Appendix A to this brief is conclusive evidence that the sole reason Congress made the amendments to Section 706 applicable to charges pending before the agency was to protect the Commission's newly conferred authority to bring suit on otherwise valid matters then being processed at the agency on an administrative basis. Admittedly Congress could have been more precise in its draftsmanship but what the Petitioner claims was intended is contrary to the facts. This is particularly so in light of the Justice Department letter which apparently was not considered in its original form by the Ninth Circuit in *Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 10 FEP Cases 1473 (1975), a case extensively relied upon by the Petitioner and in which a petition for certiorari has been pending in this Court since December 13, 1975. (Docket No. 75-836).

Petitioner's alternative argument to by-pass the statutory time limits is designed to ensnare the Court into substituting for the clear and easily administered statutory guideline in Section 706, a totally amorphous set of jurisdictional limitations that lack any uniformity and will embroil both the Commission and the Federal courts in a wide number of cases over miniscule determinations of when an individual's right accrues to file with the Commission. Petitioner's proposal, that the filing of a grievance under a collective bargaining agreement tolls the jurisdictional time limits in the Act, must fail under the Court's unanimous holding in *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 7 FEP Cases 81 (1974), which essentially severed a connection that several of courts of appeals believed had existed between Title VII suits and the procedures for the resolution of disputes under collective bargaining agreements. *Alexander* is an insurmountable hurdle to the Petitioner's case here as the Court there, recognized Title VII as creating remedies totally independent and apart from the grievance-arbitration machinery of collective bargaining contracts. The Petitioner's argument here depends entirely upon a theory that was rejected in its broadest form by the Court two and a half years ago. Petitioner's effort cannot succeed unless this Court is prepared to substantially modify its *Alexander* rationale.

The suggestion that the tolling period be determined by the terminal point of grievance-arbitration procedures in individual collective bargaining contracts is an impractical idea which would encourage countless disputes. Thus, on its own merits, the Petitioner's tolling proposal should be rejected by the Court because it is unsound and will increase—not decrease—the amount of litigation both before the

Commission and the courts arising out of Title VII procedures.

Further, such tolling would be available only to employees under collective bargaining agreements thus giving them a right not shared by three-fourths of the nation's work force. The Court is urged to reject Petitioner's proposal as inherently discriminatory and unnecessary to protect Title VII rights in view of the expansion of the statutory jurisdictional time limits for filing with the Commission under the 1972 amendments. This enlarged time frame provides ample opportunity for aggrieved persons to decide if they wish to press charges of discrimination against respondents.

Finally, the decision in *Johnson* v. *Railway Express*, 421 U.S. 454, 10 FEP Cases 817 (1975), which followed *Alexander*, further undercuts Petitioner's suggestion that tolling be looked upon with favor by this Court. The rationale of the *Johnson* case applies with equal force to her arguments here. Accordingly, a decision by this Court affirming the Court of Appeals below would be a logical extension of the Court's thinking as expressed in *Alexander* and *Johnson*. It is for these reasons that Petitioner must fail here in an effort to have the Court rather than Congress amend Title VII.

ARGUMENT

I. The Petitioners' Claim Had Been Extinguished Before The Effective Date Of the 1972 Amendments and Congress Did Not Intend to Revive It.

Although it is not entirely clear whether the issue of the retrospective effect of the 1972 amendments to

Title VII is squarely before the Court,[1] EEAC believes there are compelling reasons, on the merits, why the Court should overrule the arguments propounded for resurrecting the barred claim of the Petitioner, which previously had been extinguished when it was not timely filed with the Commission.

These arguments, the most strenuous of which has been advanced by the United States as *amicus curiae* are plainly based on an erroneous conclusion as to the intent of Congress. It is clear that the Congress, in changing the wording of Section 14 of the amending legislation, was responding to a concern that had no relationship to the time limits for filing a charge with the EEOC, the issue which is at the heart of this appeal. Its reason for providing that the Section 706 amendments would be applicable to "all charges pending before the Commission" was grounded upon anticipation of legal challenges to the exercise of the Commission's newly entrusted authority to bring suit in the Federal Courts. This source of power, long desired by the Agency but denied to it in the original legislation in 1964, was one of the major changes wrought by the 1972 amendments. The concern involved attempts to limit suits brought by the Commission only to charges filed with the Commission *after* the effective date of the amendments. With thousands of *valid* charges pending before the Commission in varying stages of the investi-

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[1] From a reading of the briefs there appears to be a sharp dispute between the parties to the case as to the appropriateness of this issue on appeal in view of some conflicting events below. The *amicus* leaves the argument to them and instead directs its comments to the broader issues.

gatory and conciliatory processes, the absence of the additional language in Section 14 would have permitted an arguable impediment to the power of the Commission to later bring suit on them. The sole intent of Congress was to confirm the Commission's power to sue in such instances. The proof of such intent is to be found in an overview of the legislative history surrounding its existence in the Act.

The most often cited excerpt from the legislative history in support of construing the amendments retrospectively is found in the waning moments of the Senate debate on February 21, 1972, when Senator Javits of New York offered an amendment to change the previously suggested wording of Section 14.[2] The reason for the proposal was plainly stated by the Senator:

> "MR. JAVITS. Mr. President, this amendment would make whatever we do enact into law applicable to pending cases. The Department of Justice has requested it in a letter to the minority leader; that is my reason for offering it." 118 Cong. Rec. 4816 (1972)

The letter sent by the Justice Department to the minority floor leader on the bill, Senator Peter Dominic of Colorado, is reproduced in full as Special Appendix A to this brief. A reading of the third paragraph (the part most relevant to this appeal) con-

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[2] Originally, Section 10 in H.R. 1746 prior to such alteration read as follows:

Section 10, H.R. 1746: Sections 706 and 710 of the Civil Rights Act of 1964, as amended by this Act, shall not be applicable to charges filed with the Commission prior to the effective date of this Act.

firms that the sole concern leading to Senator Javits' retroactivity proposal was over the newly conferred authority of the Commission to sue directly in the Federal Courts. The Ninth Circuit in *Davis* v. *Valley Distributing Co.*[3] concurs in this interpretation:

> "Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable to pending claims." *Supra*, 522 F.2d at 831, 10 FEP Cases 1474.

This much is clear and fairly finds support in the legislative history. Had the *Davis* case involved the right of the Commission to bring suit on a pre-amendment claim, otherwise validly before the Commission on the date the amendments took effect, there could be little persuasive argument to the contrary.

But the Ninth Circuit went further by concluding that subsequent floor comments on the *entire* set of amendments evidenced an intention to revive any claims of discrimination that were previously barred by operation of law. We submit that the *Davis* court over-reached in the absence of more *specific* legislative history than at hand here.[4]

The question is raised by Petitioners as to the meaning of the word "pending" and whether it could

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[3] 522 F.2d 827, 10 FEP Cases 1473 (1975), Petition for Cert. filed December 13, 1975, Docket No. 75-836 and now pending before this Court.

[4] It does not appear that the text of the letter was before the *Davis* court which was not sure of its own conclusion: "But the question is one of legislative intent; and though not free from doubt, we think it the *more* likely conclusion . . . ." *Supra*, 522 F.2d at 830. Upon reflection the *Davis* court might have ruled otherwise after reading the Justice Department letter.

be rationally applied to charges that were never validly filed with the Commission because of non-compliance with the 90-day statute of limitations in Section 706(d). Webster's New International Dictionary defines pending as "awaiting conclusion".[5] But charges barred by operation of law cannot be waiting resolution. Rather they have been disposed of for the law has done that automatically and thus they do not fall within the literal meaning of the word. In the floor discussion on Senator Javits' proposal, Senator Ervin (D-N.Car.) lends strength to this conclusion:

> "MR. ERVIN: In other words, it is just to *keep* pending charges alive, and to make them subject to the amendment to the original Act?" *supra* at 118 Cong. Rec. 4816 (1972) (emphasis supplied).

Senator Javits responded affirmatively. It is thus clear under the plain usage of these words that charges which were already dead could not be "kept" alive and that those that were pending were viable and not barred. Nothing is even remotely hinted at to evidence an intention to resurrect previously time-barred charges whether still in the Agency files or not.

The decisions of this Court have consistently given effect to federal periods of limitation. The running

[5] Webster's New International Dictionary of the English language (1925) at p. 1595. Cf. Black's Law Dictionary (1968 ed.) which defines pending as "begun, but not yet completed". p. 1291. Since Petitioner Guy's claim had already been aborted when it was not timely filed there was, in the contemplation of the law, nothing to begin to investigate or process through the Agency's machinery.

of the period of limitation "not only bars the remedy, but destroys the liability". *A. J. Phillips Co.* v. *Grand Trunk Western Ry. Co.*, 236 U.S. 662, 667 (1914). As Justice Jackson noted: "The course of action, the very foundation for relief, is extinguished." *Midstate Co.* v. *Pennsylvania Railroad Co.*, 320 U.S. 356, 364 (1943).

Petitioners and the United States, however, suggest to the Court that it infer, in the absence of any evidence, that the Congress intended to revive barred claims under Title VII. For this Court to override the specific period of limitation, EEAC submits there must be compelling proof to support such a drastic construction. The issue is not only whether Congress had the power to revive barred claims under Title VII, but whether it actually intended its legislative enactments in 1972 to have such an impact.[6]

The *amicus* believes it is clear from the legislative history that it was not the intent of Congress to make the limitations period contained in the new Section 706(e) retroactive. Even if it were otherwise, however, the retroactive effect could not constitutionally act to revive Petitioner Guy's time-barred claim. *William Danzer and Co.* v. *Gulf & Ship Island R. Co.*, 268 U.S. 633 (1925).

The Petitioner suggests to the Court that on the basis of *Chase Securities Corp.* v. *Donaldson*, *supra*,

[6] Thus, *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945), and other cases, heavily relied upon by the Petitioners, are not dispositive of the matter, for as the Court observed in *American Pipe and Construction Co.*, 414 U.S. 538, 557-8 (1974), the test is whether the impact is true to the "legislative scheme."

such legislation would be constitutional. *Chase*, however, is not controlling. There the court distinguished the legality of extending a limitations period contained in a statute which itself did not create the liability (as in *Chase*), from the unconstitutionality of extending an expired limitations period contained in a statute which itself creates the liability as in the instant case. 325 U.S. 312 n.8. This very distinction was recognized by the *Chase* opinion:

> "In the *Danzer* case, it was held that where a statute in creating a liability also put a period on its existence, a retroactive extension of the period after its expiration amounted to the taking of property without due process of law." *supra*, at 325 U.S. 312 n. 8.

Thus, contrary to Petitioners contention, once the 90-day limitation period under Section 706(d) had expired, regardless of whether Ms. Guy filed on February 10, 1972 or April 2, 1972 (after the new amendments went into effect), her claim was forever barred and the Congress could not constitutionally revive it.[7]

Further, this Court has generally been reluctant to fill in statutory gaps without a more definitive indication from the Congress. The only clear conclusion that can be made here deals with the Commission's powers of suit being applicable to pending valid claims at the Agency. The *amicus* submits that something more than vague references in conference reports and limited floor discussion is required to overcome the sharply delineated 90-day statutory time limit in the old section 706(d). If Congress wanted to revive barred claims, it could have plainly said so. It is clear, however, that it was concerned with another and totally different problem when it accepted Senator Javits' change in Section 14.

[7] This concept is not of recent origin and has a long historic basis. See Annotation to *Townsend* v. *Jemison*, 50 U.S. 407, 9 HOW 407 (1850) at 13 L.Ed. 194.

The United States, as *amicus curiae*, argues that "the Court should interpret Section (14) as applying to all charges *that were being processed* by the EEOC on March 24, 1972, whether or not the charges were timely filed under the previous limitations, if EEOC wanted to investigate them. If Section 14 was to be *that* broad, the Congress should have so indicated that it was giving the EEOC such authority.

The *amicus* EEAC strongly opposes giving retroactive effect to the 1972 amendments, because it is impossible to tell how many untimely charges are still buried in the Commission's backlog of charges with no statutory time limit for the bringing of suit by a charging party so long as their charge is still in Agency hands. The Commission has been unable to cope with its substantial backlog of charges and the number of pre-1972 ones still at the Agency is unknown.[8] Thus employers might yet under a retroactive holding have to face defending years-old matters.

[8] Augustus Hawkins (D-Calif.), Chairman of the House Labor Sub-Committee on Equal Opportunities, noted at the recent oversight hearings in May 1976 that the Commission has a backlog of over 120,000 cases and that some charges have been pending for as long as seven years. Labor Relations Reporter, Bureau of National Affairs, 92 LRR 66 (May 24, 1976).

Petitioner also contends that Guy is being penalized for having "filed too soon"; that had she not filed until *after* the effective date of the amendments, the filing would have been timely. The answer is not difficult. Congress intended to enlarge the period for filing of *new* claims of discrimination that arose after March 24, 1972. Any claims that arose out of acts of discrimination that occurred earlier were subject to the *old* period of limitation. This is a rule of common sense and one which is easily capable of administration by the Commission and the courts.[9] The short reply to the much advanced argument of "double filing" is that even if Ms. Guy had filed *after* the March 24, 1972 date, her claim would still be measured against the period of limitations which prevailed at the time the alleged act of discrimination she charges took place, which was before the effective date of the amendments.[10]

Finally much has been made by Petitioners of the Court's recent decision in *Brown* v. *GSA*, —— U.S. ——, 12 FEP Cases 1361 (1976). While the Second Circuit in *Brown* v. *GSA*, 507 F.2d 1300, 8 FEP Cases 1299 (1974) discussed the issue of retrospective application of the 1972 amendments, this Court did not offer its own comments. It is thus difficult to characterize the Court's position, at best exercised *sub silento*, and the matter frankly is not free from doubt. On the merits, the Court strictly applied the

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[9] For historical authority supporting this rule see the Annotation to *Townsend* v. *Jemison, supra.*

[10] This case thus falls within the exception of contrary legislative history alluded to in *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974).

rule of limitation and upheld the dismissal of Plaintiff Brown's case because he had not filed suit within thirty (30) days of the final action of his agency as required by Section 717(c) of the Act. Most important, however, is the fact that Brown's initial filing at the administrative level was itself timely.

The EEAC urges the Court here to hold that the 1972 amendments were not applicable to Petitioner Guy's claim lodged with the Commission. Unless the 90-day statute of limitations was tolled on some other ground, her claim was extinguished, as a matter of law, before she contacted the Commission on February 10, 1972.

II. The Court's decision in Gardner-Denver has effectively barred any tolling of the jurisdictional limitations in Title VII of the Civil Rights Act.

A. *The Court emancipated Title VII from collective bargaining contract grievance procedures including arbitration.*

EEAC believes the national labor policy should endeavor to accommodate arbitration and Title VII based upon a substantial rule of district court deferral to arbitration awards similar to that urged upon the court by the *amicus curiae* Chamber of Commerce of the United States of America in *Alexander* v. *Gardner-Denver, supra.* Much is to be said, from the viewpoint of stabilizing labor relations in this country, to warrant reconsideration of this matter at some future time. In *Alexander*, however, this court left no doubt that it viewed the rights created by Congress under Title VII to be separate, independent and un-

fettered by the collective bargaining process or any contracts arrived at through such a forum. The federal courts, according to the opinion, "have been assigned plenary powers to secure compliance with Title VII." *Supra* 415 U.S. at 45, 7 FEP Cases 84. In view of the *Alexander* decision, therefore, Petitioners tolling argument cannot be accepted by the Court.

While recognizing that an employee could be heard in the dual forums of arbitration and the Federal courts, the Court in *Alexander* was careful to point out that they were not interfaced and that the rights in each forum "have legally independent origins and are equally available to the aggrieved employee." *Supra*, 415 U.S. at 52. Any substantial connection was cleanly severed with this incisive comment:

> "But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. *Rather he is asserting a statutory right independent of the arbitration process.*" *Supra*, 415 U.S. at 54, 7 FEP Cases 88. (Emphasis supplied).

Yet despite the plain meaning of this basic observation, the Petitioners here persist in arguing that there is a direct link between the two forums and that resort to one is deferred while recourse is had to the other. Nothing in *Alexander* even begins to suggest approval of tolling or recognition of the dependency relationship urged by Petitioners on the Court here.

Strong evidence against the Petitioner's contentions is found in the Court's attitude toward the arbitration process. Every argument raised by the Petitioners as to the desirability of arbitration was expressly and unanimously rejected in *Alexander* which

the Court characterized as a "less appropriate" forum for the resolution of Title VII issues than the federal courts. One commentator in the labor law field has recently observed "the golden age of arbitration is already over".[11]

The Petitioner IUE overlooks the Court's disenchantment with collective bargaining dispute settlement procedures as being adequate to protect the rights of aggrieved persons under Title VII.[12] For this Court now to hold that the mere filing of a grievance under a collective bargaining agreement automatically tolls the running of the period of limitation for the filing of a charge with the EEOC, it must substantially retreat from its unanimous decision in the *Alexander* case where it stated that "the legislative history of Title VII manifests a Congressional intent to allow an individual to pursue *independently* his rights under both Title VII and other applicable state and federal statutes". *Supra*, 415 U.S. at 48, 7 FEP Cases 85.

The arguments of Petitioners that the Court's decision in the *Alexander* case lends support to their position on the tolling issue here are based upon a strained reading. The entire tone of the Court's opin-

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[11] David E. Feller, address before National Academy of Arbitrators, May, 1976, reported in Labor Relations Reporter, 92 LRR 70 (May 24, 1976).

[12] See Footnote 19, *Alexander* v. *Gardner-Denver*, *supra*, As previously noted, although a Union steward, Petitioner Guy originally charged the IUE here with failing to represent her in good faith, giving some support to the Court's observation in the footnote that there may be conflicting interests which militate against the use of contractual procedures to resolve Title VII complaints.

ion in *Alexander* is one of giving full and unencumbered standing to the remedies created by Congress under Title VII. In fact, the Court has already rejected the foundation of the arguments for tolling advanced by the Petitioners:

> "Title VII does not speak expressly to the relationship between the federal courts and the grievance-arbitration machinery of collective bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements and it specifies *with precision* the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." *Supra*, 415 U.S. at 47, 7 FEP Cases 85. (Emphasis supplied.)

The Court then directly follows the above sentence by listing such prerequisites with the first being the *timely* filing of a charge with the Commission.[13]

Petitioners rely most extensively on the pre-*Alexander* decisions of the Fifth, Seventh and Ninth Circuits holding that the filing of grievances in each case tolled the running of the statute of limitations under Title VII.[14] Aside from the obvious fact that

[13] The Court also cited its earlier decision in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 5 FEP Cases 965 (1973) which had referred to such timely filing as a jurisdictional requirement under the Act. A similar reference appears in *Johnson* v. *Railway Express Agency, Inc., supra*, making it the third occasion in the last three years that the Court has so held.

[14] *Culpepper* v. *Reynolds Metals Co.*, (C.A. 5) 421 F.2d 888, 2 FEP Cases 397 (1970); *Hutchings* v. *U.S. Industries, Inc.*, (C.A. 5) 428 F.2d 303 (1970), 2 FEP Cases 725; *Malone* v. *North American Rockwell*, (C.A. 9) 457 F.2d 779, 4 FEP Cases 544 (March 23, 1972); *Moore* v. *Sunbeam Corp.*, (C.A. 7) 459 F.2d 811, 4 FEP Cases 454 (1972).

they were also decided before the 1972 amendments became effective, they all are based upon an assumption that a strong degree of integration existed between the collective bargaining process and Title VII. Without belaboring the point, which is fully covered in the Respondent's brief to the Court, it should be readily apparent that the holdings in these cases are open to serious question in light of *Alexander* v. *Gardner-Denver*, *supra*.

While it is patently clear that this Court in the *Alexander* case firmly and effectively severed grievance-arbitration procedures from Title VII remedies,[15] the Petitioners nevertheless attempt to again establish a connection between the two that inevitably fails—and for good, practical reasons. About one fourth of persons employed in the Nation's work force are covered by collective bargaining agreements.[16] Thus acceptance of tolling, as urged by Petitioner, will create a special rule inapplicable to three out of every four workers in this country and at variance with the national labor policy.[17] This com-

[15] The Petitioners' allusion to footnote 21 relating to the almost casual treatment of arbitrators' decisions in the district courts does little to narrow the width of the separation.

[16] *Handbook of Labor Statistics 1975—Reference Edition*, U.S. Department of Labor Bureau of Labor Statistics, p. 389 (In 1972, only 26.7% of the labor force were union members).

[17] This problem is aptly illustrated in *McDonald* v. *Santa Fe Transportation Co.*, —— U.S. ——, 12 FEP Cases 1569 (1976). Petitioner McDonald was a union member and had a grievance filed on his behalf. Petitioner Laird, the other white person terminated, was a supervisor and outside the bargaining unit covered by the collective bargaining unit. Thus, although both men were fired as a result of the same

ment applies equally to persons who, although not covered by the National Labor Relations Act, such as supervisors, managers, and guards, nevertheless fall within the protective umbrella of Title VII.[18] Thus, a rule of tolling would discriminate against the vast majority of the Nation's work force and create a special privilege for about one quarter of those employed. This result is directly contrary to the objectives of Title VII to end discriminatory treatment and achieve equality of opportunity. It is ironic that Petitioners appear before this Court urging adoption of a rule that would be inherently discriminatory. We believe the commitment of this Court to Title VII necessitates rejection of such contention.

B. *The Specific Congressional Uniform Time Limits In Title VII Should Not Be Subordinated To The Diverse Grievance-Arbitration Procedure Standards In Labor Agreements Across The Nation.*

The Equal Employment Advisory Council believes there is a compelling urgency for this Court to stand by the jurisdictional time limits in the language of the Act. The Petitioners expand their argument before the Court and press beyond mere tolling. They further seek to shape the rule so that it would suspend the statutory time limits until the "terminal"

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incident, under Petitioner's proposal for tolling, the rights of each would accrue at different times. Congress should clearly speak out as to its intention before the Court should endeavor to go this far.

[18] Although Congress has given employees the right to bargain collectively, it equally has recognized their right to remain outside labor organizations. See the National Labor Relations Act, Section 7 (29 U.S.C. § 137).

point of grievance-arbitration procedures in collective bargaining agreements.[19]

Section 706(e) of the Act specifies a clear and definitive time frame for persons feeling aggrieved by employment discrimination to seek the assistance of the government agency created to afford them relief. It is a rule of limitation that is easily determined, capable of facile administration and contains a high degree of certainty. Such provision helps to achieve national uniformity. *Burnett* v. *New York Central RR Co.*, 380 U.S. 424, 434 (1964). The extension of Petitioner's tolling proposal, however, will do exactly the opposite. It introduces vagueness and uncertainty, lacks clear definitions and leaves the public interest in the hands of private persons who may be more preoccupied with other problems than the rights of aggrieved persons under Title VII.

No two collective bargaining agreements are alike. Each is the end product of a set of negotiations between two particular parties. As such, it is not unexpected that there are no commonality of provisions.[20] The same is true of the grievance and arbitration portion of these agreements. They vary widely in scope and detail depending upon the circum-

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[19] Petitioner's reference to an NLRB "policy" to this effect is wrong as the Board has never ruled on the question. This was confirmed by the present General Counsel John S. Irving in the transmittal letter to Petitioner's Counsel Schnapper, a copy of which was also filed with the Clerk of this court. It remains therefore an untested and adjudicated theory.

[20] Elkouri, "*How Arbitration Works,*" 3rd Ed. 1973 at p. 147.

stances between the parties.[21] Some contain very precise outlines of the various steps to be followed for the processing of a grievance while others are general.[22] It is obvious that there will be a total lack of uniformity if the time limits for filing a charge with the Commission are tied to these many different contractual grievance-arbitration procedures.

Not to be overlooked is the fact that there are contracts with no time limits for the filing of grievances. In such instances, there is nothing to prevent an aggrieved individual from having total control over the invocation of the statutory process. In essence, there would be *no* statute of limitations under Title VII in these instances.

Further, the fact that arbitration proceedings can take many months only serves to compound the situation. Each "terminal point" to start the running of the statute of limitations will depend upon the availability of the arbitrator, the number of hearings held, the time for filing of briefs and when the arbitrator renders a decision. Obviously, such a situation will confuse and not clarify matters for potential Title VII protectees. In the final analysis, practical

[21] This Court has had experience with several varieties. *Cf. Drake Bakeries, Inc.* v. *Local 50 American Bakery & Confectionary Workers*, 370 U.S. 254, 50 LRRM 2440 (1962); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 50 LRRM 2433 (1962); *Gateway Coal Company* v. *United Mineworkers of America, et al.*, 414 U.S. 368, 85 LRRM 2049 (1974); *Buffalo Forge* v. *Steelworkers*, 92 LRRM 3032 (1976).

[22] For a good capsule look at the range of this spectrum, see Sec. 51:21 *et seq.* of the updated labor relations service *Collective Bargaining Negotiations and Contracts*, published by the Bureau of National Affairs.

industrial relations considerations warrant rejection of the tolling proposal without in any way diminishing the full exercise of Title VII rights.

The doubts expressed about the grievance-arbitration machinery in *Alexander* cannot be lightly dismissed. They echo here when the proposal of the Petitioners is measured against other realities of the industrial scene. Less than two years ago this Court felt strongly enough about protecting the rights of individuals under Title VII that it altered the national labor policy on arbitration in favor of Title VII. Adoption of the tolling rule proposed by the Petitioners would literally constitute a repudiation of the rationale in *Alexander* v. *Gardner-Denver, supra.* Every argument urged by Petitioners here in favor of the arbitration process was advanced in *Alexander* by Respondent *against* the eventual outcome reached. The Court having spoken clearly there can be no doubt that grievance and arbitration procedures of labor contracts will not be superimposed by this Court upon the framework of Title VII. If that is what is desired, then Petitioners are in the wrong forum, for what they seek is an outright amendment of the statute of limitations in Section 706(e). But as this Court has pointed out repeatedly, the legislative power of government resides in the halls of Congress and not in this Court.

III. Tolling The Time Limits Under Title VII Will Increase The Amount Of Litigation Brought Under The Statute In The Federal Courts.

The practical problems commented on above will not linger long at the plant gates. The Comission will be faced with a bewildering maze of jurisdic-

tional determinations that will strain its already overburdened investigators even more. This situation will be exacerbated as such issues spill over into the District Courts when parties dispute the calculation of the period of tolling.

The Petitioners' further argument that the tolling period should be determined by the "terminal" point of the grievance-arbitration procedure will only serve to guarantee further confusion. The claim that a management decision under a labor contract is "tentative" and not final until exhaustion of the grievance machinery lacks judicial support and is at variance with the realities of industrial life. Further, a grievance is an appeal in every sense of the word from definitive management action *already* taken.[23]

The determination of when a terminal point has been reached in a grievance procedure is a natural wellspring for future litigation. It introduces elements of notice, knowledge, good faith efforts and several others that are traditional breeding grounds for contested matters. The best illustration can be found in this Court's recent experience in *McDonald* v. *Santa Fe Transportation Co.*, —— U.S. ——, 12 FEP Cases 1577 (1976) where employee McDonald contended he did not know that his "rights" under the machinery in the collective bargaining agreement

[23] Petitioner Guy's Counsel's reference on this point (Br. at p. 9) appears to be based upon a confusion with Civil Service Commission "adverse action" procedures which basically provide for review of proposed management action before it becomes final, this however, is totally inapposite to the private labor relations sector in which such an approach is foreign.

had expired until some three months after the statutory time limit in Title VII had run.[24]

It is easy to see that questions as to the proper determination of the tolling period will be constantly arising and lead to increasing litigation in the federal district courts.[25] The two examples cited in footnote 25 below refute the contention urged by Petitioners that tolling will reduce the amount of litigation. To the contrary, it only opens up new areas of dispute.

The Petitioner also urges the Court to recognize the denial of her grievance at the third step on November 18 as a refusal to rehire and another discriminatory occurrence setting off the basis for the filing of a new charge under the Act but one that

[24] Discharged on September 26, 1970, he had filed a grievance on October 2, 1970. It was denied at the third step on October 29, 1970 by the Teamsters Joint Southwest Area Grievance Committee. He was notified some five months later on April 3, 1971, that his discharge had been taken to arbitration and upheld. (See brief of Respondent Local No. 988 to this Court in Docket No. 75-260 at p. 2 and citations to appendix to petition therein.) Whether this "arbitration" was before an outside neutral or an industry "joint panel" is unknown. See *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 91 LRRM 2481 (1976). It only illustrates, however, further possible complications with the tolling rule proposed by Petitioners here.

[25] In *McDonald* v. *Sante Fe Transportation Co., supra*, the district court could not determine the duration of the tolling period without a hearing. In *Sanchez* v. *Trans World Airlines, Inc.* (C.A. 10), 499 F.2d 1107, 8 FEP Cases 627 (1974), the court of apeals said the record was unclear as to the date the proceedings were completed and remanded it to the trial court for determination on this issue. *Supra* at 499 F.2d 1110, 8 FEP Cases 628 (1973).

falls within the ninety day statute of limitations. This argument is based upon specious reasoning and should be rejected. Termination of employment puts at rest the employment discrimination because the person is no longer working for the Company. *Olson* v. *Rembrandt Printing Co.* (C.A. 8), 511 F.2d 1228, 10 FEP Cases 27 (1975). Commenting specifically on the contention that a denial of an aggrieved's request for reinstatement after discharge is a new act of discrimination, the Ninth Circuit said:

> "In this context a request for reinstatement is wholly different from a new application for employment—it seeks to redress the original termination." *Collins* v. *United Airlines*, 541 F. 2d 594, 597, 10 FEP Cases 728, 730 (1975).

No authority in point to support their novel argument is cited by the Petitioners' which is merely one more effort to evade the Congressional requirement written into the Act.

It is not in the best interests of aggrieved persons, or respondents, that there be vague and ill-defined jurisdictional requirements. The better trend is toward greater certainty as our structure of government becomes more complex. The Court has long recognized that it leans toward reducing technical paradoxes in the statutory scheme of Title VII. *Love* v. *Pullman*, 404 U.S. 522, 4 FEP Cases 150 (1972). The position urged by the *amicus* EEAC here to reject tolling enhances accessibility to the Commission and the courts by persons with *bona fide* grievances of employment discrimination and removes the encumbrances of procedures that contain hidden shoals for unwary laymen. Under Petitioner's proposal, individuals could become subject to a system of private

jurisprudence rather than the government fabric created by the elected representatives of the national legislature. No such delegation of legislative power is found in the history of the enactment of Title VII. This Court should not adopt such a construction, particularly in light of the pronouncement in *Alexander* that "Title VII does not speak expressly to the relationship between the federal courts and the grievance-arbitration machinery of collective bargaining agreements". *Supra.*

IV. The National Labor Policy Does Not Require Tolling As Necessary To Protect Rights Of Aggrieved Persons Under Title VII.

The rationale for the proposal that the statute of limitations in Section 706(e) be tolled if a grievance is filed under a collective bargaining agreement is untenable. One argument advanced is that victims of discrimination need more time to decide if they wish to assert their rights under the Act. The short answer is that Congress doubled the filing period and that six months is ample time for such a decision to be made.

A second ground urged for a rule of tolling is that by permitting access to the grievance and arbitration machinery of collective bargaining agreements, it will reduce the number of disputes ultimately going to suit. This is a naive suggestion in light of the obvious number of persons who invoke Title VII in the courts after having been told by arbitrators there are no grounds for believing they have been discriminated against.[26]

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[26] *E.g., Spann* v. *Joanna Western Mills* (C.A. 6) 446 F.2d 120, 3 FEP Cases 831 (1971); *EEOC* v. *Multiline Cans, Inc.*,

In the present case, Ms. Guy is here after an investigation by the Commission found her untimely claim to be otherwise non-meritorious. It is clear that many citizens likewise feeling aggrieved by allegedly discriminatory conduct, whether grounded in fact or not, will continue to seek relief in as many forums as this Court will allow.

The *amicus* EEAC suggests that the time has come for the Court in Title VII to adhere to its more conventional policy of demanding strict compliance with jurisdictional requirements written into the Act. This is not just because it is unfair to require employers to repeatedly bear the burden of defending the same charge, but also because it will help prevent overtaxing administrative and judicial resources. There is no gain to the public interest in having the same non-meritorious allegations heard by an arbitrator, the Commission, and the courts. Since the Congress has declined to interface the collective bargaining process with Title VII, the matter should rest there. The present structure of the Act in which a person has 180 days to file a charge with the Commission is adequate and represents the legislature's judgment on that point. Extending that period of limitation

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(D. Fla.), 7 FEP Cases 490 (1974); *Alexander v. Gardner-Denver*, on remand, 346 F. Supp. 1012, 8 FEP Cases 1153 (D. Colo. 1975); aff'd. 519 F.2d 503, 11 FEP Cases 149 (C.A. 10 1976). Cf. Professor Bernard Meltzer's recent observation before the National Academy of Arbitrators annual meeting that authorizing arbitrators to interpret and apply Title VII policy is "not likely to curb relitigation or in general to reduce the Title VII backlog." Labor Relations Reporter 92 LRR 69 (May 24, 1976).

under a rule of tolling, EEAC contends, is simply not a sound idea and should be rejected by this Court.

Ample precedent for such rejection is found in *Johnson* v. *Railway Express Agency, Inc., supra.* There the Court ruled that the Tennessee statute of limitations applicable to Section 1981 suits was not tolled by the timely filing of a charge with the Commission. The Court so found in the face of an argument that the result was unduly harsh to Title VII litigants. The Court's attitude there should be dispositive of Guy's request for tolling here. She had from November 18, 1971 until January 25, 1972, or more than 60 days after learning her grievance had been denied at the third step, in which to decide whether or not to go to the Commission. No explanation has been offered as to why she could not have filed within the statutory period and the price for relieving her of her neglect, is to plunge the statute into a procedural morass.

Petitioners' contend that permitting tolling will inure to the benefit of employers generally. Since they will be aware of the grievance, the argument goes, it will permit better preparation to defend charges if later filed with the Commission. This is not the case. Where, as here, the Petitioner does not claim discriminatory treatment as the ground for contesting the action taken by the Company under the labor contract, the employer is clearly not put on notice as to possible liability under Title VII.

Further, if tolling is permitted, an employer can go for months under the grievance-arbitration machinery and not be aware, until a charge is subse-

quently filed with the EEOC, that a violation of Title VII is being asserted against it.[27]

Under these circumstances, employers are seriously prejudiced, for the filing of a grievance does not necessarily provide adequate notice of potential Title VII claims.[28] On the other hand, absent tolling, when an employee is required to file a charge with the Commission, within the statutory time limits, an employer is properly made aware, since the Act requires the Commission to give written notice of the filing to a respondent within ten (10) days under Section 706(e).

It places no real burden on alleged discriminatees to require them to timely file with the Commission simply to protect their Title VII rights. Sanctioning a rule that avoids the clear and straight-forward requirement in the Act will not help such persons. It will only add to the confusion and probably result in more persons being foreclosed than will otherwise gain if tolling is approved. The *amicus* EEAC believes the interest of all concerned—employees, employers, the Commission, and the courts—will best

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[27] The IUE brief to this Court specifically outlines at pp. 33-4 several reasons why an aggrieved employee would want to conceal such basis for the grievance. The suggestion, however, that this would eliminate future charges before the Commission obviously is based entirely on the employer granting the relief sought. The IUE chooses to ignore that is is those persons who do not obtain such relief that then file with the EEOC.

[28] Employers thus may not take necessary steps to preserve vital evidence needed to defend against the grounds in the statute.

be served by a decision that stabilizes the procedures under Title VII.

The national policy in favor of ending discrimination does not need a rule of tolling which will apply to virtually one in four employees in the nation's work force. It does need, on the other hand, greater certainty of procedure and substantially less litigation. The entire statutory scheme should not be restructured just to alleviate the problem caused by Guy's unexcused failure to comply with the specific statute of limitations in Title VII.

CONCLUSION

For the reasons stated above, the *amicus curiae* urges the Court to reject Petitioners' contentions and to affirm the decision of the Court of Appeals for the Sixth Circuit below.

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SUPPLEMENTAL APPENDIX [1]

DEPARTMENT OF JUSTICE
Washington

Feb. 14, 1972

Honorable Peter H. Dominick
United States Senate
Washington, D. C. 20510

Dear Senator Dominick:

You have asked for my views on the relative merits of the several proposals now pending in the Senate for providing EEOC with Title VII enforcement powers. I have again examined S. 2515, the Equal Employment Opportunities Enforcement Act, and have given particular attention to Amendments 871 and 878 to the Act.

Before discussing those amendments, I should like to raise two matters of concern to us not specifically raised by either amendment. This Department and Administration oppose the present provisions of S. 2515 (Section 5) which contemplate abolition of the Attorney General's authority to bring pattern or practice lawsuits. We believe that these suits have been the most successful enforcement tool of the Federal government to date; that the Justice Department

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[1] This letter was part of the record in *EEOC* v. *Christianburg Garment Co.*, 376 F.Supp. 1067, 7 FEP Cases 1233 (W.D. Va. 1974). The Court there ascribed a similar meaning to the limited impact of the amendment to Section 14 of the 1972 amendment. The EEOC did not appeal the decision of the District Court on this construction.

has the resources and the daily relationship with the courts which cannot be adequately replaced in cases of general public importance, and that removal of that tool would constitute a step backwards in the efforts to enforce the equal employment opportunities laws. Accordingly, regardless of the Senate's choice between Amendments 871 and 878, I would hope that you would support an effort to delete the present Section 5 from S. 2515.

Secondly, the present provisions of S. 2515 (Se. 13) contemplate that the new enforcement provisions would only apply to charges filed after its effective date. We see no reason why the many thousands of persons who have filed charges which are still being processed and who have waited as long as 18 months to two years for resolution of them should not have the benefit of the new enforcement authority.

Amendment 878 (the Williams-Javits Amendment) carries foreward the main features of S. 2515 as reported by the Senate Labor Committee. Under that Amendment, EEOC will have authority to issue orders, which may become enforceable in the courts after opportunity for judicial review. Although the words "cease and desist orders" in the original bill have been deleted and the term "recommendation" substituted therefore, this change does not appear to be a substantial one, since under either version the EEOC position becomes an enforceable order unless modified by the court upon review. Like the committee bill, the Williams-Javits Amendment calls for judicial review of the EEOC order on the administrative record. Sec. 706(k)(1), pp. 6 & 7 of the Amendment. Like the Committee bill, the Williams-Javits Amendment makes the findings of EEOC "conclu-

sive" on the courts if supported by "substantial evidence on the record as a whole" (Sec. 706(k)(2), p. 7 of the Amendment).

Although the Williams-Javits Amendment provides for filing of the administrative complaint with the district court, we do not perceive any substantial change resulting from that novel procedure. Also, the Williams-Javits Amendment provides for an interlocutory appeal to the district court on any "controlling question of law" if it finds that such review "would materially advance the ultimate termination of the litigation." It is doubtful that this addition is a significant one, since controlling issues of law were judicially reviewable under S. 2515, and this Department's experience under the analogous provisions for interlocutory appeal from district court decisions (28 U.S.C. 1292(b)) indicates that such appeals are only useful on rare occasions.

The one material change which the Williams-Javits Amendment would make in S. 2515 is to transfer judicial review from the courts of appeals to the district court. This change adds another layer of review to the already lengthy process of charge, investigation, cause finding, administrative complaint, hearing before hearing examiner, review before the Commission and review in the Court of Appeals.

Amendment 871 (the Dominick Amendment) on the other hand, authorizes the EEOC to proceed in the appropriate United States District Court to secure relief from any employment practice it deems unlawful. In such proceedings, the evidence would be heard by the District Judge and the facts found by him. In addition, under the Dominick Amend-

ment, those judicial proceedings would be expedited and the General Counsel could require the convening of a three-judge court with direct review in the Supreme Court upon a filing of a certificate of general public importance.

As you know, when I testified before the subcommittee on Labor of the Senate Committee on Labor and Public Welfare in October last year on behalf of the Department of Justice and the Administration, I again expressed our view that the granting of authority to the Equal Employment Opportunity Commission to bring judicial proceedings is a better means of enforcing Title VII than granting that Commission administrative enforcement powers. We will adhere to that view.

In my testimony before the Senate Labor Committee I set forth four grounds for our view that judicial enforcement is preferable to administrative proceedings. (Hearings pp. 150-151.) One of those was applicable only to governmental employers and was accepted by that Committee. The other three bases for our view may be summarized as follows: (1) Federal district judges hold court throughout the country and enjoy a confidence and respect in their communities which cannot be matched by administrative officers; and their authority to issue enforceable orders enables them to resolve cases speedily; (2) because of the sensitive nature of the issues to be resolved and the fact that the larger cases involve the rights and expectations of substantial numbers of people, it is inappropriate to leave the critical factual determinations and formulations of relief to hearing examiners and Commissioners sitting in Washington; and (3) the fact that Federal courts

resolve the factual and legal issues in equal opportunity cases in the areas of voting, housing, and education make them a particularly appropriate forum for resolving the same kinds of issues in employment discrimination cases. In addition, I pointed out that there is a definite, although hard to measure, advantage in having the person who has heard the evidence be responsible for fashioning the relief which he must then enforce (Hearings, p. 156).

In our opinion, each of these considerations is still applicable, and each of them counsels in favor of court enforcement approach of Amendment 871 (the Dominick Amendment) rather than the administrative fact-finding approach of Amendment 878 (the Williams-Javits Amendment). In short, we support court enforcement and Amendment 871, rather than administrative enforcement, as the best method of securing widespread compliance with Title VII of the Civil Rights Act of 1964.

Sincerely,

/s/ David L. Norman
DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

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